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Supreme Court, U.S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

—v.—

ARLO TATUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 25, 1971
CERTIORARI GRANTED NOVEMBER 16, 1971

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOCKET ENTRIES

1970

February 17—Complaint, appearance, exhibits A, B, C, & D.

February 17—Summons copies (6) and copies (6) of Complaint issued. A. G. ser. 2-18; D.A. ser 2-18; No. 1 ser 2-20; No. 2 ser. 2-20; No. 3 ser 2-20.

March 12 —Motion of pltf. for temporary restraining order; c/m 2-12-70, filed.

March 12 —Motion of pltf. for preliminary injunction; P&A in support of temporary order and a preliminary injunction; affidavit (2); exhibit A thru J; c/m 3-12-70; M.C. filed.

March 13 —Proposed temporary restraining order denied; set down for hearing—usual course on preliminary injunction. (N) (fiat) McGuire, J.

March 19 —Opposition of deft. to motion for a preliminary injunction; affidavit; c/m 3-19-70, filed.

March 23 —Motion of defts. to dismiss; P&A p/s 3-20-70; M.C.; appearance of Benjamin C. Flannagan, filed.

April 29 —Order granting with prejudice defts' motion to dismiss; pltfs' motion for preliminary injunction denied as moot. (N) Hart, J.

May 4 —Notice of appeal by pltfs. from order of April 29, 1970; copies mailed to Walter Yeagley, Asst. U.S. Attorney; deposit by Speiser $5.00, filed.

May 5 —Record on Appeal delivered to USCA; deposit by Lawrence Speiser $1.10.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

24203

DOCKET ENTRIES

DATE	
5- 5-70	Certified original record (including transcript of proceedings, pgs 1 & 2, 1-46) (n)
5- 5-70	4-Appellants' motion for summary reversal of order dismissing complaint or for expedited processing of this appeal (p-4)
5-11-70	4-Appellees' opposition to motion for summary reversal and motion for summary affirmance (m-11)
6-12-70	Per Curiam order denying appellant's motion for summary reversal and expedited processing and appellee's motion for summary affirmance, Fahy, Sr. C.J., McGowan, C.J.
6-12-70	4-Appellants' motion for leave to file motion for extension of time to file brief (m-12)
6-24-70	Order per Wilkey, ACJ extending time to file appellant's brief to July 15th
7-13-70	4-Appellants' motion for leave to file deferred appendix (m-7)
7-24-70	Order per Judge Wright granting appellants' motion for leave to proceed under Rule 30 (c) of the F.R.A.P.
7-24-70	1-Appellants' brief (m-15)
8-17-70	1-Appellee's brief (m-17)
10- 1-70	25-Appellants' brief (m-1)
10- 2-70	4-Appellants' motion for leave to file appendix, time having expired (m-2)

DOCKET ENTRIES

DATE	
10- 8-70	Clerk's order granting appellant's motion for leave to file appendix, late
10- 8-70	10-Appendix (m-30)
10-14-70	25-Appellees' brief (m-14)
1-13-71	4-appellants' motion for leave to file reply brief (m-11)
1-15-71	Clerk's order granting appellant's motion for leave to file reply brief, late
1-15-71	25-Appellant's reply brief (p-11)
1-20-71	Argued before Tamm, MacKinnon and Wilkey, CJ on motion of Mrs. Hope Eastman, Frank Askin, Esq. a member of the bar of the Supreme Court of New Jersey was allowed to argue pro hac vice for appellant
2- 3-71	4-Counsel motion for leave to withdraw as co-counsel (m-2)
2-10-71	Order CJ Bazelon granting motion of Lawrence Speiser, for leave to withdraw as co-counsel
4-27-71	Opinion by Circuit Judge Wilkey
4-27-71	Opinion by Circuit Judge MacKinnon, concurring in part and dissenting in part
4-27-71	Judgment reversing judgment of the District Court, and remanding case to the District Court for further proceedings consistent with opinion (n)
5-18-71	4-Appellee's motion for stay of mandate (m-18)
6- 2-71	Per Curiam Order by the Clerk granting appellee's motion to stay the mandate; the Clerk is directed to stay the issuance of the opinion and certified copy of this Court's judgment of April 27th to and including June 17th. The stay shall be subject to the provision of Rule 41(b) of the Federal Rules of Appellate Procedure.

DOCKET ENTRIES

DATE	
6-17-71	4-Appellees' motion for stay of mandate (m-17)
7-17-71	Per Curiam Order by the Clerk granting appellee's motion for stay of mandate; directing Clerk to stay the issuance of the mandate to July 19th. Tamm, MacKinnon and Wilkey, Circuit Judges.
7-16-71	4-Appellee's motion for stay of mandate (m-16)
7-27-71	Per Curiam order granting appellee's motion for stay of mandate, Clerk is directed to stay the issuance of the opinion, and certified copy of this court's judgment to August 25. Tamm, MacKinnon and Wilkey, CJ
8-27-71	Notice of filing for Petition for Certiorari on August 25, 1971 (S.C. #71-288 O.T. 71)
11-22-71	Certified copy of order of Supreme Court granting petition for certiorari on November 16th (S.C. 71-288)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 459-70

ARLO TATUM, Central Committee for Conscientious Objectors, 2016 Walnut St., Philadelphia, Pa., 19103; WOMEN STRIKE FOR , 2016 P St., N.W., Washington, D.C. 20036; CONRAD LYNN, 401 Broadway, New York, N.Y. 10003; CHICAGO AREA WOMEN FOR PEACE, 343 S. Dearborn, Chicago, Ill. 60604; VIETNAM WEEK COMMITTEE OF THE UNIVERSITY OF PENNSYLVANIA by its members Richard M. Feigenberg, 928 Chestnut St., Philadelphia, Pa. 19107, Lawrence R. Cohen, 3413 Race St., Philadelphia, Pa., 19104, and Frederick W. Stanton, 4830 Walton Ave., Philadelphia, Pa. 19143; VIETNAM EDUCATION GROUP c/o Hamlin, 1400 Murray Drive, N.W. Knoxville, Tenn. 37912; REV. ALBERT B. CLEAGE, JR., c/o Shrine of the Black Madonna, 7625 Linwood Ave., Detroit, Mich. 48206; VETERANS FOR PEACE IN VIETNAM, 431 S. Dearborn St., Chicago, Ill. 60605; BENJAMIN N. WYATT, JR., 1718 West Santa Barbara Ave., Los Angeles, Calif. 90062; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, 1155 - 15 St. N.W., Wash., D.C., AND ITS LOCAL 1733, Memphis, Tenn.; VIETNAM MORATORIUM COMMITTEE, 1029 Vermont Ave., N.W., Wash., D.C. 20005, CLERGY AND LAYMEN CONCERNED ABOUT VIETNAM, 475 Riverside Drive, New York, N.Y. 10027; WAR RESISTERS LEAGUE, 339 Lafayette St., New York, N.Y. 10012, PLAINTIFFS

v.

MELVIN B. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army, GENERAL WILLIAM C. WESTMORELAND, Chief of Staff, United States Army; BRIG. GENERAL WILLIAM H. BLAKEFIELD, Commanding General, U.S. Army Intelligence Command, DEFENDANTS

COMPLAINT

Plaintiffs, by their attorneys, allege as follows:

JURISDICTION

1. This is a civil action for declaratory and injunctive relief. The jurisdiction of this court arises under 28 U.S.C. §§ 1331, 1361, 2201 and 2202, and under the Constitution of the United States, in particular Article III and the First and Fourth Amendments. The amount in controversy is in excess of $10,000.

PARTIES

2. *Plaintiffs*

1) Arlo Tatum is Executive Secretary of the Central Committee for Conscientious Objectors, an unincorporated association. The purposes of the Central Committee for Conscientious Objectors are to maintain freedom of conscience, to interpret the moral and legal basis of conscientious refusal to participate in war, to counsel and assist conscientious objectors to conscription, civil defense, and the payment of taxes for military purposes, and to encourage an end to conscription.

2) Women Strike for Peace, an unincorporated association, is an organization of women which demands of governments that nuclear weapons tests be banned forever, that the arms race end, and that the world abolish all weapons of destruction under United Nations safeguards. It also urges immediate planning at local, state, and national levels for a peacetime economy with freedom and justice for all.

3) Conrad Lynn is a black attorney admitted to practice before the New York State Court of Appeals. He has long been active in the fight for racial justice.

4) Chicago Area Women for Peace, an unincorporated association, is an organization of women opposed to United States participation in the war in Vietnam, against nuclear testing and against militaristic societies.

5) The Vietnam Week Committee of the University of Pennsylvania, is an unincorporated association. The purpose of the Vietnam Week Committee was to organize opposition to the Vietnam War. Richard M. Feigenberg is former Chairman of the Committee. Lawrence R.

Cohen and Frederick W. Stanton are former members of the Committee.

6) The Vietnam Education Group (Knoxville, Tenn.) is an unincorporated association whose purpose is to educate the public about the United States' role in the Vietnam war.

7) Rev. Albert B. Cleage, Jr. is Minister of the Shrine of the Black Madonna, Detroit, Michigan, and an advocate of black self-determination. He is a columnist for *The Chronicle*, a black newspaper published in Detroit.

8) Veterans for Peace in Vietnam, an unincorporated association, is composed of veterans of the armed forces of the United States who are opposed to the United States' participation in the Vietnam war.

9) Benjamin N. Wyatt, Jr. is a black attorney admitted to practice in the State of California. He has long been active in the fight for racial justice.

10) The American Federation of State, County and Municipal Employees is an unincorporated association of working men and women in government-employment. Its Local 1733, Memphis, Tenn., represents employees of the City of Memphis including its Department of Sanitation.

11) The Vietnam Moratorium Committee, an unincorporated association, was formed to call attention to American Vietnam policy. The Moratorium seeks to build a broad based coalition of people opposed to present policy and supporting immediate withdrawal of American troops.

12) Clergy and Laymen Concerned About Vietnam is an unincorporated association of clergymen and laymen opposed to America's participation in the war in Vietnam. It seeks to educate the public about the facts of the war and the American role in that war.

13) War Resisters League, an unincorporated association, believes war to be a crime against humanity. The WRL, founded in 1923, advocates Gandhian non-violence as the method for creating a democratic society free of war, racism and human exploitation.

Defendants

3. The defendants Laird, Resor, Westmoreland and Blakefield are, respectively, the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Commanding General, U.S. Army Intelligence Command, and together have responsibility for the administration of the programs and policies challenged in this action. They are sued individually and in their official capacities.

CLASS ACTION

4. The plaintiffs sue on their own behalf and on behalf of all other individuals and organizations who wish to exercise their right under the First Amendment of the United States Constitution to engage in peaceful political protest, demonstrations, marches, rallies, church meetings and other forms of constitutionally protected expression and assemblies without surveillance by defendants' agents and without becoming the subject of dossiers, reports, and files, defendants' data bank and intelligence network. Such individuals and organizations constitute a class too numerous to bring before the court. There are common questions of law and fact affecting all members of the class and common relief is sought. The class is fairly and adequately represented by plaintiffs herein.

CAUSE OF ACTION

5. Plaintiffs seek the court's protection of their right to engage in lawful political activity guaranteed by the First Amendment to the United States Constitution without fear of harassment, intimidation and injury resulting from investigation, surveillance and record keeping by military authority.

6. The defendants, through the investigative and intelligence agencies of the United States armed forces, and in particular the U.S. Army Intelligence Command, which they manage and control, are engaged in the surveillance of lawful and peaceful civilian political activity within the United States.

7. The information collected in the course of this surveillance, including all of the information known by the plaintiffs to have been collected concerning them, serves no legitimate military purpose.

8. Much of the information on lawful political activity included in the Army's files and dossiers was acquired by defendants' agents surveillance of lawful and peaceful political activities, by anonymous informants, and through the use of photographic and electronic equipment. Other information in these files was obtained from local and state police departments and from the Federal Bureau of Investigation.

9. The information collected by the defendants' agents is regularly, widely and indiscriminately circulated via military teletype maintained by defendants. This network provides every major Army troop command in the continental United States and military headquarters in Europe, Alaska, Hawaii and Panama with daily and weekly reports on virtually all political protest occurring anywhere within the United States.

10. Attached as Exhibit A to this complaint and made part thereof is a sample of the reports circulated over the aforementioned teletype. The attached report was circulated on or about March 18, 1968. It includes details of entirely lawful and constitutionally protected political activity engaged in by plaintiffs and others. Plaintiffs numbered 1-10 in paragraph 2. above are specifically named in Exhibit A. Plaintiffs numbered 11-13, on information and belief, have been named in other similar reports.

11. The defendants and their agents publish an eight-by-ten-inch glossy paperback booklet known in Army intelligence circles as the "Blacklist." This list is believed to be an encyclopedia of profiles of individuals and organizations who, in the opinion of its compilers, "might cause trouble for the Army."

12. Defendants and their agents store information about the lawful and peaceful political activities of the plaintiffs and other civilians in a computerized data bank located at the U.S. Army Intellgence Command Headquarters, Fort Holabird, Maryland. The office responsi-

ble for these records is the "CONUS Intelligence Branch, Operations IV, U.S. Army Intelligence Command." This office maintains computerized and non-computerized records of the political activities of the plaintiffs and other civilians which are of no lawful interest to the defendants and their agents. These records include reports pertaining to individuals and organizations, and reports pertaining to lawful political events.

13. Defendants plan to make the information contained in the data bank, mentioned in the preceding paragraph, available to numerous federal and state agencies upon request.

14. The information contained in the foregoing paragraphs numbered five through thirteen was published in the January 1970 issue of the magazine *The Washington Monthly*, in an article entitled "CONUS Intelligence: The Army Watches Civilian Politics" by Christopher H. Pyle, a former Captain in Army Intelligence. A copy of that article is attached hereto as Exhibit B. A synopsis of that article was contained in a news story in *The New York Times* on January 16, 1970. A copy of *The New York Times* dispatch is attached hereto as Exhibit C. The substance of the Pyle article was confirmed by the Army in response to inquiries by Morton Kondracke, a reporter for the Chicago *Sun-Times*. A copy of his article of January 27, 1970, syndicated in the *New York Post*, is attached hereto as Exhibit D.

15. The purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and other similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment by invading their privacy, damaging their reputations, adversely affecting their employment and their opportunities for employment, and in other ways.

16. The effect of defendants' activities described herein and the widespread publicity given thereto is to cast a pall over lawful political protest in the United States and to deter plaintiffs and other similarly situated from

exercising their First Amendment rights for fear they will be made subjects of reports in the Army's intelligence network, that permanent reports of their activities will be maintained in the Army's data bank, that their "profiles" will appear in the so-called "Blacklist" and that all of this information will be released to numerous federal and state agencies upon request.

17. The conduct of the defendants described herein deprives plaintiffs and persons similarly situated of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy guaranteed and protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States, and deprives all Americans of basic First Amendment rights by inhibiting and curtailing free and open discussion of issues of public importance.

18. The establishment and administration by the defendants and their agents of the intelligence program described above, exceeds the lawful needs and authority of the United States Army and is without any lawful statutory authority.

19. Plaintiffs have no adequate remedy at law, and unless and until this court grants declaratory and injunctive relief to halt the activities described in this complaint, irreparable injury will continue to be done to plaintiffs and all other similarly situated as well as to the national interest.

WHEREFORE, PLAINTIFFS PRAY FOR THE FOLLOWING RELIEF:

1. A declaratory judgment that the surveillance, collection, maintenance, storage and distribution of information about the lawful political activities of the plaintiffs and persons and organizations similarly situated—including the publication known as the "Blacklist"—is unconstitutional.

2. Preliminary and permanent injunctions restraining the defendants, their agents, and their employees, from spying on, surveilling, collecting information about, and maintaining records and dossiers of any kind about the

lawful political activities of plaintiffs and persons and organizations similarly situated within the United States.

3. A mandatory injunction ordering the defendants to produce before this court, for destruction, all blacklists, publications, records, reports, photographs, recordings, data computer tapes and cards, and other materials describing the lawful political activities of the plaintiffs and other persons and organizations similarly situated and maintained by any and all military agencies within the United States and overseas.

4. A permanent injunction forbidding the defendants, their agents, and their employees from attaching any security classification to intelligence records pertaining to lawful political activity within the United States.

5. Any other and further relief which the court may deem just and proper in the circumstances.

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EXHIBIT A TO COMPLAINT

AIC 116 HQ

AIC CONUS HQ

P-IrI8452 Mar 68

From: CGUSAINTC FTHOLABIRD MD

To: AOC, PENTAGON

Info: EOC, CONARC
CINC, USSTRICOM
CINC, USAREUR
CINC, USARPAC (THRU 710TH MI DET)
CG, USARSO (VIA REGISTERED MAIL
CG, USARAL (VIA REGISTERED MAIL)
CG, AMC (THRU USAINTC LNO)
CG, ARDCOM (THRU 113TH MI GP)
CG, USASTRATCOM (THRU 115TH MI GP)
CG, FIRST ARMY (THRU 109TH MI GP)
CG, THIRD ARMY (THRU 111TH MI GP)
CG, FOURTH ARMY (THRU 112TH MI GP)
CG, FIFTH ARMY (THRU 113TH MI GP)
CG, SIXTH ARMY (THRU 115TH M GP)
CG, XVIII ABM CORPS
CG, III CORPS (THRU DCSI FOURTH ARMY)
CG, MDW (THRU 116TH MI GP)
CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY)
CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY)
CG, 82D ABN DIV (THRU XVIII ABN CORPS)
CG, 5TH INF DIV (THRU DCSI FIFTH ARMY)
PHG, USA
CG, USARHAW (THRU 710TH MI DET)
CG, FT DEVENS (THRU 108TH MI GP)
CO, 902D MI GP (THRU 116TH MI GP)
CO, 108TH MI GP
CO, 109TH MI GP

CO, 111TH MI GP
CO, 112TH MI GP
CO, 113TH MI GP
CO, 115TH MI GP
CO, 116TH MI GP
CO, 710TH MI DET
DIRECTOR ANMCC (PASS TO DIA ELEMENT—)
USAINTC LNO, PENTAGON

SUBJECT: USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12

The following summary contains items of intelligence interest for the period 0600 hrs, Monday 11 March 68 to 0600 hrs, Monday 18 March 68 and information concerning significant future events:

SECTION I: THE PAST WEEK

Monday, 11 March 1968

Hartford, Conn.: Approximately 20 persons picketed outside the U.S. Federal Building. The protestors carried placards denouncing the war in Vietnam and the payment of income tax. The demonstration was sponsored by the Voluntown, Conn., Chapter of the New England Committee for Non-Violent Action.

Tuskegee, Alabama: Stokley Carmichael spk to a group of about 2000 Tuskagee Institute (TI) students concerning the black power philosophy. He indicated that negroes should arm themselves for protection against "Whitey," and that they should fight in the United States and not in Vietnam. His speech was followed by a question and answer period. At the end of the session, the crowd dispersed quietly and without incident.

Tuesday, 12 March 1968

Boston, Mass.: An estimated 85 demonstrators representing the New England Resistance gathered at the gates of the Boston Army Base to protest the induction

of Peter Crews. There was one scuffle between protestors and a counter protestor. As a result, extra police were called to the scene. The demonstration terminated without further incident. The demonstrators paraded to the University of Massachusetts in Boston, where another brief demonstration was held. There were no incidents at the latter demonstration.

Buffalo, N.Y.: Demonstrators were observed picketing in front of the Buffalo Afees Station for the second consecutive day. On 11 Mar. there were only 12 pickets, but on 12 Mar. approximately 25-30 demonstrators were observed. These individuals were believed to be members of the SDS from State University of New York at Buffalo.

Wednesday, 13 March 1968

Brooklyn, N.Y.: About 35 persons participated in a demonstration at the main gate of Fort Hamilton to protest the scheduled induction of Peter Behr. Many of the protestors distributed leaflets and flowers to persons entering the Fort. The demonstration lasted approximately one and one half hours and ended without incident.

Columbia, S.C.: Approximately 200 negroes from Allen University and Benedict College in Columbia joined a group of about 900 students from South Carolina State College (SCSC) and Claflin College, Orangeburg, S.C., in a demonstration at the State Capitol Building. This protest was a continuance of the demonstration held by SCSC students at Capitol on 7 Mar 68 (reference USAINTC Weekly Summary Number 68-11). About 20 South Carolina state patrolmen equipped with batons, pistols, gas masks and steel helmets were on hand to prevent any violence. Following an unsuccessful attempt by approximately 30 negro demonstrators to enter the State Capitol, the Orangeburg protestors re-boarded thirteen chartered buses and returned to their respective schools. During the demonstration about fifteen negroes, including James Weston, Sociology Professor at SCSC, were admitted to the Governor's office for a brief conference. There are no details about what took place in his office.

Minneapolis, Minn.: Approximately 25 persons from Eau Claire, Wisconsin, demonstrated in front of the Washington Avenue AFEES, after protesting the Selective Service System in general and specifically the pre-induction processing of Steve Smith from Eau Claire. There was no violence. While undergoing processing, Smith took several pictures of AFEES personnel and some rooms in the building. He was also seen taking notes on the induction process.

Madison, Wisconsin: Approximately 50 members of the Community Action Party staged a demonstration at Bascom Hall on the University of Wisconsin Campus. They were picketing a team of recruiters from Boeing Aircraft Company (reference USAINTC Weekly Summary Number 63-11). The entire demonstration was peaceful and there were no incidents.

Los Angeles, Calif.: Approximately 100 members of the resistance staged a peaceful demonstration at the Los Angeles AFEES, in support of Bill Garraway who was scheduled for induction. No incidents were reported, and the demonstrators dispersed peacefully.

San Jose, Calif.: An Anti-Dow Chemical Company demonstration was held in front of the Administration Building at San Jose State College (SJSC). A crowd of about 400-500 persons were present, but approximately 90% of these were spectators or curious onlookers. At 1230 hrs. the demonstrators moved to the Morris Daily Auditorium where they were refused permission to hold a rally. SJSC officials, however permitted the protestors to use the music building for an afternoon rally. The rally received very little support and attendance was light.

Thursday, 14 March 1968:

Memphis, Tenn.: After several days of peaceful marches and meetings, members of the Sanitation Union became involved in an attempt to block trash removal by non-union workers (reference USAINTC Weekly Summary 68-11). The incident resulted in the arrest of about 30 persons on charges of disorderly conduct. Earlier in

the day, 6 persons had been arrested by Memphis police for attempting to delay the departure of garbage trucks from the department of sanitation parking lot. To date, there are no indications that an early settlement in the sanitation strike will be reached.

Friday, 15 March 1968:

Philadelphia, Pa.: A. The Philadelphia Chapter of the Women's Strike for Peace sponsored an anti-draft meeting at the First Unitarian Church which attracted an audience of about 200 persons. Conrad Lynn, an author of draft evasion literature, replaced Yale Chaplain William Sloan Coffin as the principal speaker at the meeting. Following question and answer period Robert Edenbaum of the Central Committee for Conscientious Objectors stated that many Philadelphia lawyers were accepting draft evasion cases. The meeting ended without incident.

B. Rev. Albert Cleage, Jr., the founder of the Black Christian Nationalist Movement in Detroit, spoke to an estimated 100 persons at the Emmanuel Methodist Church. Cleage spoke on the topic of black unity and the problems of the ghetto. The meeting was peaceful and police reported no incidents.

Washington, D.C.: David Dellinger of the National Committee to end the war in Vietnam joined two other anti-war speakers in an appearance before a group of about 55 persons who had gathered in Judiciary Square to demonstrate their opposition to the war in Vietnam. The group subsequently marched on the offices of the Internal Revenue Service (IRS) and picketed outside while a delegation spoke with IRS officials. A spokesman for the delegation indicated that they would refuse to pay that portion of their income tax which went to finance the Vietnam war. After the delegation returned from the peaceful confrontation, the entire group dispersed without incident.

Detroit, Mich.: A group of about 100 persons gathered in front of the Fort Wayne Induction Center to protest the scheduled induction of Tom Nixon, a leader of the Detroit Draft Resistance Committee (DRC). The

protestors displayed anti-draft/Vietnam placards and passed out anti-draft literature which had been printed by the socialist workers party. Nixon arrived at the induction center but refused to begin processing and a federal marshal arrested him. There were no further incidents and the demonstrators dispersed quietly.

Chicago, Ill.: Approximately 30 members of the Chicago Area Draft Resistors (CADRE) participated in a peaceful demonstration in front of the Van Buren Street AFEES. The protestors were apparently demonstrating in support of Robert Freestom, an active CADRE member who was scheduled for induction. The demonstrators dispersed without incident and police made no arrests.

Saturday, 16 March 1968:

Providence, R.I.: Vice President Hubert Humphrey arrived at the Sheraton Biltmore and entered the hotel without incident although approximately 75 demonstrators were picketing the entrance. At 1515 hrs. a group of about 1000 students and faculty members from Brown University (BU) Rhode Island School of Design and Pembroke College marched from the BU campus to a park across from the hotel. A petition bearing names of those who would refuse to be drafted was taken into the hotel by a delegation from the group. Of the 537 names reportedly on the petition, about 340 belonged to women students at Pembroke College. At 1625 hrs. the Vice President departed the hotel without incident. A few of the demonstrators remained in the area overnight, but there were no incidents and police made no arrests.

Riverside, Calif.: During the 50th Anniversary Celebration Parade at March Air Force Base, a group of about 30 protestors began a parallel march to protest the war in Vietnam. The protestors wore black arm bands and carried anti-war placards. The anti-war group made no attempt to interfere with the parade and police made no arrests.

Sunday, 17 March 1968:

Washington, D.C.: A. About 21 members of an organization known as Movimento Insurrectional De Recuperacion Revoluncionaria (MIRR) participated in a peaceful demonstration at the White House. The demonstrators carried placards which reflected their support for American policy in Vietnam. (Note: This group was previously reported as the Movement Insurrectional Recooperation—Mir. reference USAINTC Weekly Summary Number 68-11)

B. Stokley Carmichael of the Student Non-Violent Coordinating Committee (SNCC), spoke at the church of the redeemer in Washington, D.C. to an unknown number of people on black power and the black united front, urging all black people to come together. Carmichael ended the speech with words from Rap Brown, "We shall conquer without a doubt". He indicated that March 20 would be International Rap Brown Day (See Wednesday, 20 March 1968). There was no violence and no arrests were made.

Chicago, Ill.: Approximately 300 members of veterans for Peace and Women for Peace held a peaceful demonstration at the Museum of Science and Industry protesting an exhibit by the US Army. Several demonstrators entered the building in spite of warnings by museum officials and 6 were arrested on charges of disorderly conduct, resisting arrest and criminal trespassing. Five of those arrested were juveniles.

Los Angeles, Calif.: Approximately 250-300 negroes staged a mock trial for a Los Angeles police officer. The incident resulted from the shooting of a Los Angeles negro by the officer. The demonstration was sponsored by the Los Angeles Student Non-Violent Coordinating Committee, the Black Panthers and "US". Speakers included Reverend Clayton D. Russell, Head of People's Independent Church, Los Angeles; Ben Waytt, Los Angeles negro attorney; and Franklin Alexander, Southern California District Representative, Communist Party, USA. The demonstrators passed out "Wanted" posters of the officer, and found him "Guilty of First Degree Murder." The demonstration was peaceful.

SECTION II: FORECAST OF FUTURE EVENTS

Monday, 18 March 1968:

Miami, Fla.: A spokesman for the Southern Students Organizing Committee announced plans for a demonstration to be held on the campus of the University of Miami during the morning. According to the spokesman, a group of anti-war/draft supporters will participate in the demonstration.

Baltimore, Md.: Members of the Baltimore Inter-Faith Peace Mission intend to demonstrate at the Baltimore U.S. Post Office to support the four individuals on trial for pouring blood into the records of the Selective Service Board on 27 Oct. 1967.

Monday, 18 March—Tuesday, 19 March 1968:

Philadelphia, Pa.: Members of the Vietnam Week Committee composed largely of professors and students of the University of Pennsylvania, will conduct a "sleep-in" to protest the scheduled appearance of Dow Chemical Company recruiters on campus. The next day, 19 March, the same organization will sponsor a protest rally on campus.

Tuesday, 19 March—Wednesday, 20 March 1968:

Sacramento, Calif.: On 19 Mar. a draft resistance rally has been scheduled on the campus of Sacramento State College for the purpose of attracting support for 5 persons who plan to refuse induction on the following day. The rally will be sponsored by the Sacramento Draft Resistance Union. On 20 Mar. the demonstrators will allegedly attempt to disrupt the induction processing of the 5 individuals at the Selective Service Building. At the present time, there are no indications as to the number of persons who will participate in either demonstration.

Wednesday, 20 March, 1968:

New Orleans, La.: A spokesman for SNCC has proclaimed that 20 March will be officially designated as "H. Rap Brown Day". According to the spokesman, sympathy demonstrations are scheduled for the following cities: Washington, D.C.; Detroit, Michigan; and, Atlanta, Georgia. At the present time, specific details concerning the number of participants and the exact locations of the demonstrations are unknown.

Thursday, 28 March 1968

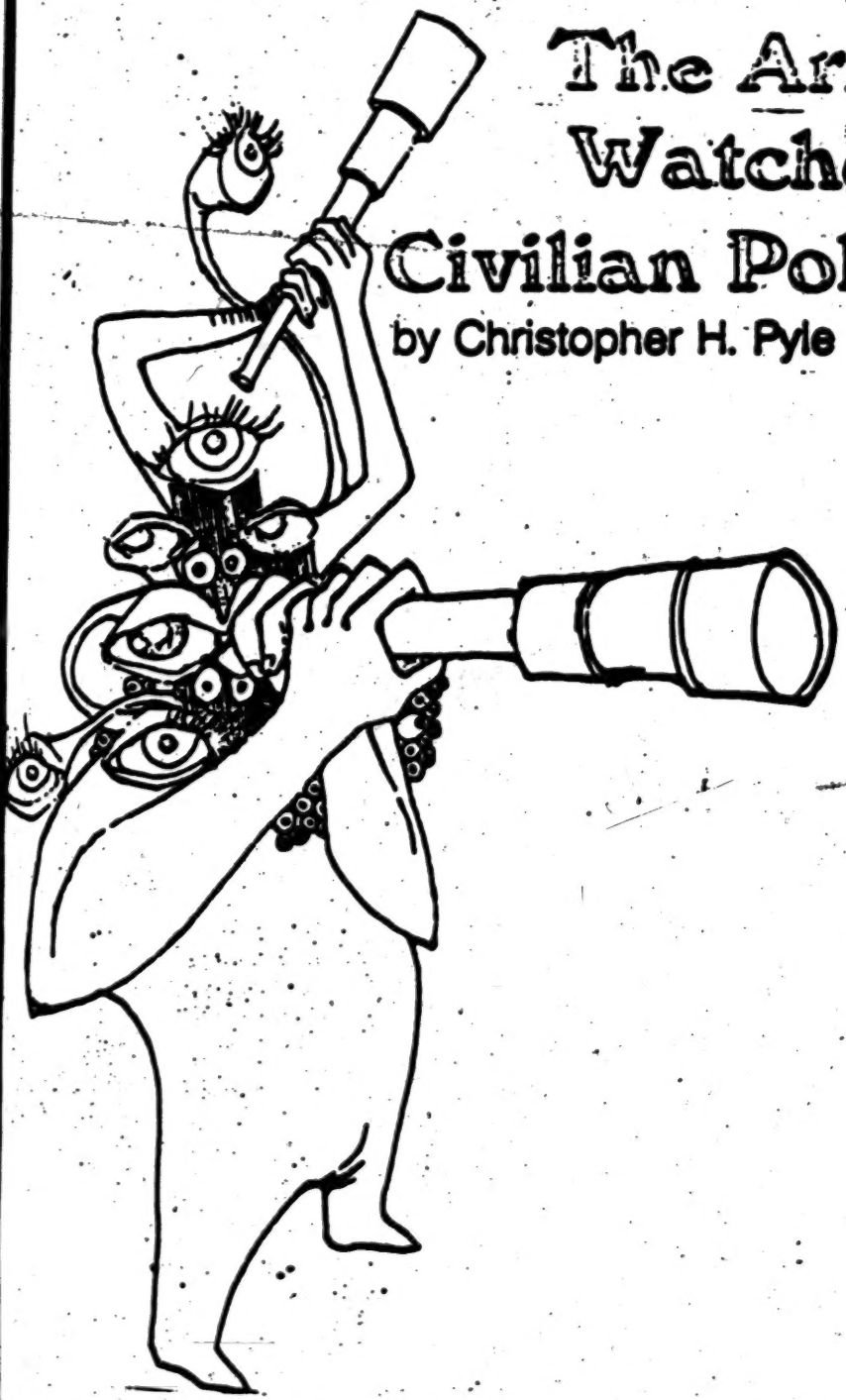
Knoxville, Tenn.: An unchartered chapter of the Vietnam Education Committee at the University of Tennessee has scheduled an anti-war demonstration in protest of the appearance of General Lewis Hershey, Director of the Selective Service System.

This command will publish periodic special interest summaries to addressees in addition to the regular weekly summary whenever upcoming events of unusual importance develops within Conus.

DOUGHERTY FOR BLAKEFIELD

EXHIBIT B

CONUS Intelligence:



The Army Watches Civilian Politics

by Christopher H. Pyle

ristopher H. Pyle, a Ph.D. candidate at Columbia University, has recently completed two ars service as a captain in Army Intelligence. The information in this article comes from brief- s he received at the headquarters of the U.S. Army Intelligence Command, and from observations of friends and acquaintances who served in intelligence units throughout the States and Europe. None of it carries a security classification of any kind.

For the past four years, the U.S. Army has been closely watching civilian political activity within the United States. Nearly 1,000 plainclothes investigators, working out of some 300 offices from coast to coast, keep track of political protests of all kinds—from Klan rallies in North Carolina to anti-war speeches at Harvard. This aspect of their duties is unknown to most Americans. They know these soldier-agents, if at all, only as personable young men whose principal function is to conduct background investigations of persons being considered for security clearances.

When this program began in the summer of 1965, its purpose was to provide early warning of civil disorders which the Army might be called upon to quell. In the summer of 1967, however, its scope widened to include the political beliefs and actions of individuals and organizations active in the civil rights, white supremacy, black power, and anti-war movements. Today, the Army maintains files on the membership, ideology, programs, and practices of virtually every activist political group in the country. These include not only such violence-prone organizations as the Minutemen and the Revolutionary Action Movement (RAM), but such non-violent groups as the Southern Christian Leadership Conference, Clergy and Laymen United Against the War in Vietnam, the American Civil Liberties Union, Women Strike for Peace, and the National Association for the Advancement of Colored People.

The Army obtains most of its information about protest politics from the files of municipal and state police departments and of the FBI. In addition, its agents subscribe to hundreds of local and campus newspapers, monitor police and FBI radio broadcasts, and, on occasion, conduct their own undercover operations. Military undercover agents have posed as press photographers covering anti-war demonstrations, as students on college campuses, and as "residents" of Resurrection City. They have even recruited civilians into their service—sometimes for pay but more often through appeals to patriotism. For example, when Columbia University gave its students the option of closing their academic records to routine inspec-

tion by government investigators, the 108th Military Intelligence Group in Manhattan quietly persuaded an employee of the Registrar's Office to disclose information from the closed files on the sly.

Typical of the hundreds of reports filed by Army agents each month are the following, taken from the unclassified intelligence summary for the week of March 18, 1968:

> PHILADELPHIA, PA: A. THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. CONRAD LYNN, AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEETING, FOLLOWING A QUESTION AND ANSWER PERIOD. ROBERT EDENBAUM OF THE CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.
>
> B. REV. ALBERT CLEAGE, JR., THE FOUNDER OF THE BLACK CHRISTIAN NATIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS.
>
> CHICAGO, ILL: APPROXIMATELY 300 MEMBERS OF VETERANS FOR PEACE AND WOMEN FOR PEACE HELD A PEACEFUL DEMONSTRATION AT THE MUSEUM OF SCIENCE AND INDUSTRY PROTESTING AN EXHIBIT BY THE US ARMY. SEVERAL DEMONSTRATORS ENTERED THE BUILDING IN SPITE OF WARNINGS BY MUSEUM OFFICIALS AND 6

WERE ARRESTED ON CHARGES OF DISORDERLY CONDUCT, RESISTING ARREST AND CRIMINAL TRESPASSING, FIVE OF THOSE ARRESTED WERE JUVENILES.

To assure prompt communication of these reports, the Army distributes them over a nationwide wire service. Completed in the fall of 1967, this teletype network gives every major troop command in the United States daily and weekly reports on virtually all political protests occurring anywhere in the nation.

The Army also periodically publishes an eight-by-ten-inch, glossy-cover paperback booklet known within intelligence circles as the "blacklist." The "blacklist" is an encyclopedia of profiles of people and organizations who, in the opinion of the Intelligence Command officials who compile it, might "cause trouble for the Army." Thus it is similar to less formal lists which the Department of Health, Education, and Welfare has maintained to exclude politically unpopular scientists from research contracts and consultant work.

Sometime in the near future the Army will link its teletype reporting system to a computerized data bank. This computer, to be installed at the Investigative Records Repository at Fort Holabird in Baltimore, eventually will be able to produce instant print-outs of information in 96 separate categories. The plan is to feed it both "incident reports" and "personality reports." The incident reports will relate to the Army's role in domestic disturbances and will describe such occurrences as bombings, mass violence, and arms thefts. The personality reports—to be extracted from the incident reports—will be used to supplement the Army's seven million individual security-clearance dossiers and to generate new files on the political activities of civilians wholly unassociated with the military.

In this respect, the Army's data bank promises to be unique. Unlike similar computers now in use at the FBI's National Crime Information Center in Washington and New York State's Identification and Intelligence System in Albany, it will not be restricted to the storage of case histories of persons arrested for (or convicted

of) crimes. Rather it will specialize in files devoted exclusively to descriptions of the lawful political activity of civilians. Thus an IBM card prepared many months ago for the future computer file of Arlo Tatum, executive secretary of the Central Committee of Conscientious Objectors, contains a single notation—that Mr. Tatum once delivered a speech at the University of Oklahoma on the legal rights of conscientious objectors.

Because the Investigative Records Repository is one of the federal government's main libraries for security clearance information, access to its personality files is not limited to Army officials. Other federal agencies now drawing on its memory banks include the FBI, the Secret Service, the Passport Office, the Central Intelligence Agency, the National Security Agency, the Civil Service Commission, the Atomic Energy Commission, the Defense Intelligency Agency, the Navy, and the Air Force. In short, the personality files are likely to be made available to any federal agency that issues security clearances, conducts investigations, or enforces laws.

Headquarters for the collection and coordination of this information is a wire-mesh "cage" located inside a gray metal warehouse at Fort Holabird. The official designation of the office is "CONUS Intelligence Branch, Operations IV, U.S. Army Intelligence Command." CONUS is the Army's acronym for Continental United States. Direction of this program is in the hands of Major General William H. Blakefield, head of the U.S. Army Intelligence Command at Fort Holabird. Established in 1965, the Command coordinates the work of a number of counterintelligence "groups" formerly assigned to the G-2 offices of the major stateside Armys. Accordingly, its principal function is not to collect intelligence but to protect the Army from espionage, sabotage, and subversion. Its main job is to investigate persons being considered for security clearances and to inspect military installations for adequate physical, wire-communications, and document security.

CONUS Intelligence Branch, also known as "Ops Four," is commanded by a major and run by a civilian. They supervise the work of about a dozen persons, who work

in shifts around the clock. Most are WAC typists who operate the teletype consoles that link the Intelligence Command to the Pentagon and to intelligence units around the country. It is here that reports from agents are received, sorted, and retransmitted. Because its staff is small and the volume of reports large, Ops Four rarely has the time to verify, edit, or interpret the reports before passing them on to "user organizations."

Daily recipients of this raw intelligence include all of the Army's military intelligence groups within the United States, riot-control units on stand-by alert, and the Army Operations Center at the Pentagon. The Operations Center, sometimes called the "domestic war room," is a green-carpeted suite of connecting offices, conference rooms, and cubicles from which Army and Defense Department officials dispatch and coordinate troops that deal with riots, earthquakes, and other disasters. Recipients of weekly CONUS intelligence summaries, also prepared at Fort Holabird, include not only those on the daily distribution, but such unlikely organizations as the Army Materiel Command, the Military District of Washington, the Air Defense Command, and Army headquarters in Europe, Alaska, Hawaii, and Panama.

What is perhaps most remarkable about this domestic intelligence network is its potential for growth. Uninhibited by Congressional or Presidential oversight, it has already expanded to the point where it in some ways rivals the FBI's older internal-security program. If the Army's fascination with the collection of domestic intelligence continues to grow as it has in the recent past, the Intelligence Command could use military funds to develop one of the largest domestic intelligence operations outside of the communist world. Before this happens, the American public and its elected representatives ought to demand a say in the development of this program.

The Army's Needs

Intentionally or not, the Army has gone far beyond the limits of its needs and authority in collecting domestic political information. It has created an activity which, by its existence alone, jeopardizes individual rights, demo-

cratic political processes, and even the national security it seeks to protect.

There is no question that the Army must have domestic intelligence. In order to assist civilian authorities, it needs maps and descriptions of potential riot or disaster areas, as well as early warning of incidents likely to provoke mass violence. Before trusting its employees or prospective employees with military secrets, it has to look into their past behavior for evidence of disloyalty or unsuitability. The Army also must investigate train wrecks, fires, and other disasters which may disrupt its lines of supply. And where ultra-militant groups seek to attack military installations, destroy files, or abuse soldiers, it has the right and obligation to keep informed about the groups' specific objectives, plans, and techniques.

The Army needs this kind of information so that it can fulfill long-established, legitimate responsibilities. But must it also distribute and store detailed reports on the political beliefs and actions of individuals and groups?

Officials of the Intelligence Command believe that they must. Without detailed knowledge of community "infrastructure," they argue, riot-control troops would not be able to enforce curfews or quell violence. To support this contention, they cite the usefulness of personality files and blacklists in breaking up guerrilla organizations in Malaya and South Vietnam. One early proponent of this view was the Army's Assistant Chief of Staff for Intelligence during 1967-1968, Major General William P. Yarborough. At the height of the Detroit riots of 1967 he instructed his staff in the domestic war room: "Men, get out your counterinsurgency manuals. We have an insurgency on our hands."

Of course, they did not. As one war-room officer who attempted to carry out the General's order later observed: "There we were, plotting power plants, radio stations, and armories on the situation maps when we should have been locating the liquor and color-television stores instead." A year later the National Advisory Commission on Civil Disorders reached a similar conclusion about the motives of ghetto rioters. "The urban disorders of the

summer of 1967," it declared unequivocally, "were not caused by, nor were they the consequence of, any organized plan or 'conspiracy.'" After reviewing all of the federal government's intelligence reports on 23 riots, it found "no evidence that all or any of the disorders or the incidents that led to them were planned or directed by any organizations or groups, international, national, or local."

Intensive investigations subsequently conducted by local police departments, grand juries, city and state committees, and private organizations have concurred. One of the more recent, a study of 1968 "urban guerrilla" activities by the Lemberg Center for the Study of Violence at Brandeis University, is typical. It found that press and police accounts of shooting incidents were grossly exaggerated. While acknowledging that there had been "a few shoot-outs with the police" some of which "may have been planned," the Center concluded that there was "no wave of uprisings and no set pattern of murderous conflict" from which one could predict organized violence even remotely resembling guerrilla warfare.

But even if there were grounds for making such a prediction, the Army's case for personality files and blacklists would remain weak. The purpose of these records, according to counter-insurgency manuals, is to facilitate the selective arrest of guerrillas and insurgents. However, within the United States the Army has no authority to round up suspects the moment civilians take up arms. The seizure of civilians on suspicion of conspiring or attempting to overthrow the government by unlawful means or of inciting people to crime is, and continues to be, the responsibility of local and state police and of the FBI. The President may order Army units to help state or federalized National Guard troops keep the peace or fight guerrillas, but the Army does not acquire authority to arrest civilians unless and until civilian law enforcement has broken down and a declaration of martial law puts all governmental authority in the area of conflict in the hands of the military. In that highly remote circumstance, the Intelligence Command might have some need for personality files and blacklists on criminally inclined, politically motivated civilians. By then, however, it certainly

would have full access to the more extensive and up-to-date files of the civilian agencies and thus would not have had to prepare its own.

The Army's need to keep its own dossiers on the politics of law-abiding citizens and groups makes even less sense. So long as there is a possibility that peaceful protests may get out of hand, some surveillance undoubtedly is in order. But must the Army conduct it? Are its agents and record keepers more competent than those of the FBI or of the police departments of the cities in which large demonstrations typically occur? Are the civilian law enforcement agencies so uncooperative that the Army must substantially duplicate their efforts?

More extraordinary still is why the Intelligence Command each week alerts military headquarters in Alaska, Hawaii, Panama, and Europe to stateside non-events like the following:

> MIAMI, FLA: A SPOKESMAN FOR THE SOUTHERN STUDENTS ORGANIZING COMMITTEE ANNOUNCED PLANS FOR A DEMONSTRATION TO BE HELD ON THE CAMPUS OF THE UNIVERSITY OF MIAMI IN THE MORNING, ACCORDING TO THE SPOKESMAN. A GROUP OF ANTI-WAR/DRAFT SUPPORTERS WILL PARTICIPATE IN THE DEMONSTRATION.
>
> PHILADELPHIA, PA: MEMBERS OF THE VIETNAM WEEK COMMITTEE COMPOSED LARGELY OF PROFESSORS AND STUDENTS OF THE UNIVERSITY OF PENNSYLVANIA, WILL CONDUCT A "SLEEP-IN" TO PROTEST THE SCHEDULED APPEARANCE OF DOW CHEMICAL COMPANY RECRUITERS ON CAMPUS. THE NEXT DAY, 19 MARCH, THE SAME ORGANIZATION WILL SPONSOR A PROTEST RALLY ON CAMPUS.

Perhaps the best answer to all of these questions is that much of the CONUS intelligence program serves no military need at all. But if this is so, then where does the Army get the authority to run it?

The Army's Authority

According to the Nixon Administration, authority for this kind of program comes from the Constitution. So, at least, the Justice Department claimed last June in a brief defending the FBI's failure to obtain search warrants before tapping telephone calls of what were then the "Chicago Eight." The Justice Department argued that Article Two of the Constitution authorizes the President and his agents to engage in whatever "intelligence-gathering operations he believes are necessary to protect the security of the nation" and that this authority "is not dependent upon any grant of legislative authority from Congress, but rather is an inherent power of the President, derived from the Constitution itself." Thus, the Department contended, "Congress cannot tell the President what means he may employ to obtain information he needs to determine the proper deployment of his forces."

If this is so, then Army agents do have the authority to undertake any surveillance that does not run afoul of the Constitution and the courts; indeed, they can investigate anything that is normally investigated by the federal government's civilian agencies. Moreover, they do not have to obey laws like the Omnibus Crime Control Act of 1968 which forbids most wiretapping and electronic eavesdropping without prior judicial authorization in the form of a warrant.

Fortunately, the "inherent powers doctrine," as this theory is called, has few supporters. The courts have never accepted the proposition that Congress is powerless to prescribe how the President shall exercise his executive powers. Indeed, in 1952, the Supreme Court rejected President Truman's claim to inherent power to seize the nation's steel mills to avert a strike which threatened the flow of equipment and supplies to American troops fighting in Korea. If there were no constitutional Presidential power to meet that emergency, it is unlikely that one exists to authorize the intelligence powers which the government claims today.

It is far more probable that the courts would endorse a conflicting view: that the Army's authority to collect

domestic intelligence is limited by, and can only be ininferred from, those laws which traditionally mark off the Army's reseponsibility for law enforcement from that of other agencies. These include not only the statutes which restrict the Army to a back-up function in times of riot, but the laws which assign surveillance of unlawful political activity within the United States to the FBI and the Secret Service. Other sources of the Army's authority include the Uniform Code of Military Justice, which permits investigation of unlawful political activity within the armed services, and those laws and federal-state agreements under which the Army governs many of its installations. These rules, and not the vague provisions of Article Two, are the legitimate sources of the military's domestic-intelligence powers.

Yet even if the current Administration's claim to an inherent constitutional power to watch lawful political activity were to be accepted by the courts, the surveillance itself probably would be forbidden by the Bill of Rights. The reason is the chilling effect which knowledge of surveillance has upon the willingness of citizens to exercise their freedoms of speech, press, and association, and their right to petition the government for redress of grievances.

Ten years ago the federal courts would not have accepted this contention. Then the courts were hesitant even to accept constitutional challenges to the government's collection of political information when the plaintiffs could prove that the investigators had no other purpose than to deter them from exercising their rights under the First Amendment. Recently, however, the courts have begun to accept the proposition that vague and overbroad laws and administrative actions are unconstitutional if they inhibit the exercise of those rights, regardless of whether that effect was intended.*

* Typical of this growing body of constitutional interpretation is the 1965 case of *Lamont* v. *Postmaster General*. There the Supreme Court struck down a federal statute which authorized the Post Office to suspend delivery of unsolicited mail which the government agents regarded as "Communist political propaganda" until the addressee returned a reply post card declaring that he wished to

The Program's Impact

Beyond the Army's need for the present CONUS intelligence program and its authority to pursue it lies the matter of its impact upon the public interest. In particular, there is its effect upon the rights of individuals, the democratic process, and the nation's security.

The impact which the program can have upon the exercise of political rights needs no further explication. The threat it poses to job rights and privacy, however, may not be so apparent.

Like the freedom from inhibitory surveillances, the job rights threatened are rights in the making. As yet no one has established a legal right to a job that requires a security clearance or to a security clearance essential to a job. Nevertheless, in recent years the courts have begun to recognize that those who already hold federal

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receive the mail. The Court, in a unanimous opinion, held that the effect of this practice, whatever the government's purpose, was to abridge freedom of speech by inhibiting the right to read.

Even more on point is the decision of a New Jersey Superior Court which last August declared most of that state's domestic intelligence system unconstitutional. In *Anderson* v. *Sills*, a suit filed by the America Civil Liberties Union on behalf of the Jersey City branch of the NAACP, the court held: "The secret files that would be maintained as a result of this intelligence system are inherently dangerous, and by their very existence tend to restrict those who would advocate . . . social and political change."

Had the New Jersey authorities been able to show a more urgent need for the records, the court might not have taken such a categorical position. But the police, like the Army, had cast their net so widely that it was bringing up huge quantities of information on wholly lawful political activities. Accordingly, the court brushed aside the state's claim to good intentions and found that the program had a chilling effect upon the exercise of First Amendment rights. It ordered all forms and files destroyed, "except where such information will be used to charge persons with specifically defined criminal conduct."

If people are likely to be deterred in the exercise of their rights by state intelligence systems, they undoubtedly will be inhibited by knowledge that reports of individual participation in public demonstrations are being made daily to the Pentagon, selected troop units, and an interagency data bank at Forth Holabird. Thus, even if the Army's collection of personality files and blacklists is not limited by legislation, it still may be unlawful.

jobs and security clearances have a right not to be deprived of either without just cause or, at the very least, without the rudiments of fairness. The impending marriage of the CONUS intelligence wire service to a computer could nullify even this protection, by filling security-clearance dossiers with unverified and potentially erroneous and irrelevant reports. These reports would then be used to determine who should, and should not, receive security clearances.

If the men and women who adjudicate security clearance were competent to evaluate such unreliable information, its inclusion in security files might be less cause for concern. Unfortunately, they are not. The most highly trained adjudicators—civilians employed by the stateside army commands—receive only nine days of job instruction on loyalty determinations at the Army Intelligence School. Moreover, this training does not even touch upon the subject of suitability, although almost 98 per cent of all clearances denied today are ostensibly rejected on that ground. The least trained adjudicators —intelligence officers assigned to field commands—receive exactly two classroom hours on loyalty and two on suitability while being trained to become investigators. Because of this extremely brief training, it is not unusual for an adjudicator to conclude that a person arrested in connection with a political protest is not suited for a security clearance, regardless of the circumstances of his arrest, the legality of his detention, or his innocence of the charges.

The adjudicators' lack of training is compounded by security regulations which permit—indeed, seem to require—the denial of clearances on less evidence than would support a magistrate's finding of "probable cause." In other words, it is not a question of whether reliable evidence indicates that the individual cannot be trusted with state secrets, but of whether the granting of the clearance would be "clearly consistent with the interests of national security." No one really knows what this ambiguous phrase means, but in practice it frequently is used to justify findings of guilt by association. For example, soldiers and civilian employees of the Army

with foreign-born spouses are virtually blocked from jobs requiring access to especially sensitive intelligence. Their association with a spouse who once "associated with foreigners" is taken as proof of their vulnerability to recruitment by foreign agents. Moreover, in nearly all other cases, adjudicators usually have to make their decisions without knowing the source of the evidence, without hearing the accused confront his accusers, or without hearing the accused defend himself with knowledge of their identity.

Given the tenuousness of the right to due process under these conditions, the influx of CONUS intelligence reports can make the system even more unjust than it is now. At the present time, little information on political activity is developed in the course of most background investigations. Army investigations, in particular, tend to be superficial; in some sections of the country shortages of personnel, caused by the war in Vietnam, have forced the Intelligence Command to abandon interviews of character references in favor of questionnaires-by-mail as its main means of inquiry. But if these questionnaires were to be supplemented by CONUS political reports, the number of clearances unjustly denied would skyrocket. These injustices would occur not only within the military; they would reverberate throughout all federal agencies with access to the Fort Holabird data bank.

The Army's domestic-intelligence program also imperils numerous expectations of privacy, some of which enjoy the status of legal rights. It does so by exposing Americans to governmental scrutiny, and the fear of scrutiny, to an extent to which they have never been exposed before. Even the Budget Bureau's ill-starred proposal to consolidate the federal government's statistical records into a National Data Center would not have brought together so much information about individual beliefs and actions.

The privacy of politically active citizens is especially threatened by the Army's practice of watching political protests, large and small, throughout the United States. To the potential protester, it is one thing to expect local press and police coverage; it is quite another to expect a

military surveillance which specializes in keeping permanent records of lawful political activity.

What effect awareness of the CONUS intelligence program will have on the vast majority of people who are *not* politically active is more difficult to predict. By itself, news that the Army is watching civilian politics is not likely to cause most people to worry personally about their privacy. But it would be one more increment in a growing pattern of governmental intrusiveness that could have a significant cumulative impact.

Such a pattern is now well established. Among the more widely publicized activities in recent years have been the CIA's surreptitious financing of student groups, labor unions, and foundations (despite the territorial limits of that agency's mandate), the Post Office's use of peepholes in restroom walls, and the Defense Department's misuse of lie detectors. Others include countless illegal wiretaps by the FBI, the Internal Revenue Service, and the Department of the Interior. More recently, the publication of confidential FBI wiretap information by *Life* and *Newsweek* which linked Jets' quarterback Joe Namath to Mafia figures suggests that the FBI has now assumed responsibility for enforcing professional football's code of conduct.

The cumulative impact of such abuses of power and privacy eventually must convince even the most anonymous of individuals that the United States is moving towards a society in which no one has control over what others know about him. Public awareness of the Army's activities cannot but hasten this conviction.

The unregulated growth of CONUS intelliegnce machinery also threatens the country's political health. It does so both by inhibiting political participation and by enhancing the potential clout of demagogues and others who would misuse security files for partisan or personal purposes.

The most immediate risk posed, of course, is to political participation. Once citizens come to fear that government agencies will misuse information concerning their political activities, their withdrawal from politics can be expected. This withdrawal can occur in a variety of

ways. Some people may decline to become involved in potentially controversial community organizations and projects. Others may go further and avoid all persons who support unpopular ideas or who criticize the government. Some may refuse to object to the abuse of government authority, especially when the abuse is committed in the name of national security. Others may even stop reading political publications, out of fear that the government might learn of their reading habits and disapprove. Indeed, an adjudicator of security clearances once asked me if she could lose her clearance if she allowed her daughter to subscribe to *The National Observer!*

Inhibitions generated by awareness of extensive domestic surveillance are likely to be strongest at the local level. This is where most citizens participate in politics if they become involved at all. The withdrawal can be expected to occur all across the political spectrum, although the strongest objections to surveillance will undoubtedly come from the left. Those most likely to be deterred, however, are not the extremists of the right or the left, whose sense of commitment runs deep, but the moderates, who normally hold the balance of power. Depletion of their ranks would, of course, strengthen the influence of the extremists, polarize debate, increase animosities, and decrease tolerance. As political positions rigidify, compromise and flexibility would become harder to achieve. And the capacity of government to renew itself and promote responsible progress would also suffer.

A less immediate but no less serious danger lies in the potential for misuse inherent in the Army's extensive files on individuals and groups. It is frightening to imagine what could happen if a demagogue in the Martin Dies-Joseph McCarthy tradition were to gain access to the computer the Army seeks now, or if an Otto Otepka in uniform were to leak a copy of the Intelligence Command's so-called "blacklist" to friends in Congress, or if a General Edwin Walker were to take charge of the Intelligence Command.

Such speculation assumes, of course, that the Army cannot guarantee the inviolability of its files. The as-

sumption, unfortunately, has some validity. Only last year, information from the Army's confidential service record on New Orleans District Attorney Jim Garrison was leaked to the press. Officers at the Investigative Records Repository at Fort Holabird (which functions as the Army's lending library for such files) suspected that the leak came from a civilian agency in Washington. They were helpless to do anything about it, however, because they had no system of records accountability by which they could fix responsibility. When asked why such a system did not exist, one officer told me: "We probably couldn't stop it [the leaks] if we tried."

Finally, the unregulated growth of domestic intelligence activity can have the paradoxical effect of undermining the very security it seeks to protect. It can do so in at least two ways. First, by increasing the "cost" of lawful political activity, it tends to force extremist groups to go underground, there to act out their us-versus-them view of politics by criminal means. Second, by intruding too closely into the lives of government employees (or prospective employees), it tends to inhibit them from applying for jobs requiring security clearances or from exercising initiative and imagination in those jobs. A good intelligence officer must be able to analyze and report accurately, and to do so he must feel free to immerse himself in the ideas and culture of the people he studies. A good scientist must have freedom to pursue his curiosities, or he is not likely to work for the government, which rarely pays as much as private industry. The direct consequence of programs which deny this freedom is to impair the quality of secret work and the caliber of the men who do it. As John Stuart Mill warned over a century ago:

> A state which dwarfs its men, in order that they may be more docile instruments in its hands, even for beneficial purposes, will find that with small men no great thing can really be accomplished. . . .

What Can Be Done?

If the Army has exceeded the limits of its needs and authority to establish a domestic intelligence program which endangers numerous public interests, what steps should be taken to curb its excesses?

An obvious first step is a court challenge of the Army's authority to possess information for which it has no substantial need. The main target of such a lawsuit should be the personality files and blacklists describing the *lawful* political activities of individuals and groups. A second target should be the collection and storage of information on individuals and groups suspected of participating in *unlawful* political activity—except where that information is essential to an "early warning" system, or where the persons involved are associated with the armed forces, or where the information is collected in the course of security investigations.

The lawsuit's argument should be twofold: (1) the Army has no substantial need for either kind of information, and (2) the very existence of the program inhibits the exercise of First Amendment rights. Such a suit should seek a court order declaring the Army's possession of both kinds of information to be unconstitutional; it should also ask the court to enjoin future collection and storage of such information and to direct the destruction of all existing personality files and blacklists.

While such a lawsuit stands a good chance of success, it could take years to litigate. Moreover, a favorable decision could be ignored or evaded for many more years. Thus, while the symbolic value of such a decision would more than justify the time and expense, an effective challenge of the intelligence program will require the development of legislative and administrative remedies as well.

Whoever attempts to devise these remedies should be prepared to undertake subtle analyses of competing interests and values, for while the excesses of the program must be permanently curbed, the Army's ability to fulfill its responsibilities must not be impaired.

Ideally, legislative and executive analyses should be based on the kinds of questions I have already asked:

What are the Army's real domestic intelligence needs? What authority does it have to initiate specific activities to meet those needs? What threats to liberty does each domestic intelligence effort pose?

The analysis should begin by demanding a justification for each alleged intelligence need in terms of the Army's authority to meet such a need and its purpose in trying to do so. Each need should then be weighed against the threats it may pose to the rights of individuals, to the vitality of the political process, and to the security of the nation. Where the risk is clear and the need doubtful, the Army should be denied authority to satisfy the need. Where the threat and the Army's need are both evident, less hazardous alternatives ought to be considered. In this circumstance, the capacity of politically responsible officials to control the alternatives should be weighed. Where reliable controls cannot be devised, the intelligence effort should not be authorized—even though the denial of authority may deprive the government of useful knowledge about the domestic political scene. If the imposition of these restraints poses a risk to internal security, then we must accept that risk as the price for individual liberties and a truly democratic political system.

The Congressional power of inquiry should be exercised first. Few Americans—including most members of Congress—know anything about the activities and plans of the *domestic* intelligence community. Many do not even realize that the growth of formal and informal ties among law-enforcement, intelligence, and security agencies has made it necessary to think in such terms.

For maximum effectiveness, Congress should hold open hearings not only to inform itself and the public, but to remind the intelligence community in general, and the Army in particular, that their authority to spy on civilian politics must be construed strictly, in accordance with such established principles as civilian control of the military, Presidential control of the bureaucracies, state and civilian primacy in law enforcement, compartmentalization and decentralization of intelligence duties, and obedience to law. Where it is not, corrective legislation should be promised.

A special effort should be made in the course of these hearings to inform the domestic intelligence community that Congress does not accept the Justice Department's position that "Congress cannot tell the President what means he may employ to obtain the information he needs."

Congress should also exercise its appropriations power so as to encourage major reforms in the Army's program. Specifically, it should block all funds for the planned computer unless and until the Army agrees to:

(1) Instruct its agents to limit their collection of CONUS intelligence to reports of incidents, except where the reports describe violations of the Uniform Code of Military Justice or of Army regulations. This would dry up the source of most blacklists and personality files.

(2) Forbid the Intelligence Command to convert incident reports into personality reports, except where they relate to criminal or deviant activity by persons subject to military law or employed by the military. Thus storage of information about named civilians unassociated with the armed forces would be doubly foreclosed, should such information be reported by mistake or as an essential element of an incident report.

(3) Establish effective technological, legal, and administrative safeguards against the abuse of individual rights in the process of collecting, reporting, storing, and disseminating domestic intelligence or personnel security information. For example, the Army should forbid its agents to infiltrate civilian political groups. (If it fails to do so, Congress should make such infiltration a federal crime for a local military commander to order his troops to serve in a sheriff's posse.) Computer storage systems also should be encouraged, since they can be equipped with more effective safeguards against misuse than is possible in document storage systems. However, these safeguards must be carefully designed, regularly tested, and reinforced by laws and regulations to deter those who might seek to circumvent them.

(4) Establish separate headquarters, preferably in separate cities, for the CONUS-intelligence and personnel-security staffs. So long as the two programs are located at the same headquarters (they now share the same room

and some of the same personnel), the danger of informal leakage of CONUS intelligence material to the adjudicators will remain high. Establishment of physically separate headquarters would be expensive, since it would probably require two separate communications and information storage systems. Separate storage systems, however, could be more safely computerized. Thus some of the additional expense might be recouped through increased efficiency.

(5) Request that the United States Judicial Conference or some similar body nominate a civilian advisory board to review and report annually on the sufficency of the Intelligence Command's procedures for safeguarding individual rights. Such a board could satisfy both the public's need for a regularized system of independent scrutiny and the Army's need for friendly critics capable of alerting it to the legal, moral, and political implications of its domestic intelligence program. How successful such a board can be is open to question; much depends upon how skillfully its members can be chosen so as to assure both military and public confidence in their capacity for balanced and constructive judgments.

(6) Improve the professional quality of Intelligence Command personnel and security-clearance adjudicators. In the final analysis, the Army must be the front-line defender against the dangerous consequences of its own actions. Thus, among other things, the Army should be encouraged to end the overcrowding and understaffing of its Intelligence School, to revise and expand the curriculum of its agents' course, and to transfer the training of security-clearance adjudicators to an accredited law school or the Practising Law Institute, a non-profit organization well known for its practical courses for lawyers and laymen on specialized legal subjects.

Needless to say, each of these reforms should be initiated by the President or the Army without waiting for Congressional encouragement. In addition, the President should appoint a panel of distinguished citizens, on the order of the Kerner Commission, to look into the conduct of all domestic intelligence activities. He should also ask an organization like the highly prestigious American

Law Institute to draft a new executive order, and code of regulations to govern the granting of security clearances.

Implementation of these reforms can do much to bring the Army's domestic intelligence practices in line with its legitimate responsibilities. But it is not enough to reform the Army. The Intelligence Command is only one member of a huge, informal community of domestic intelligence agencies. Other members of the community include not only the FBI, the Secret Service, the Air Force, and the Navy, but hundreds of state and municipal police departments. Some of the latter are surprisingly large. The New York City Police Department's Bureau of Special Services, for example, employs over 120 agents and has an annual budget in excess of $1 million.

Each of these organizations now shares with the Army the capacity to inhibit people in the exercise of their rights, even without trying. By collaborating, they could become a potent political force in their own right. Thus as the Army, the FBI, and the Justice Department strive to coordinate these agencies through the establishment of wire services, hot lines, and computerized data banks, it is essential that the American public and its representatives be equally energetic in the imposition of checks and balances. In particular, special efforts should be made to prevent needless concentrations of information. The United States may be able to survive the centralization of intelligence files without becoming totalitarian, but it most certainly cannot become totalitarian without centralized intelligence files. The checks must be designed with the most unscrupulous of administrators in mind. The fact that we may trust the current heads of our investigative agencies is no guarantee that these agencies will not one day come under the control of men for whom the investigatory power is a weapon to be wielded against political and personal foes.

EXHIBIT D

[New York Post, Tuesday, January 27, 1970]

ARMY ADMITS FILING DATA ON CIVILIANS

By MORTON KONDRACKE

WASHINGTON (CST)—The Army has acknowledged that it keeps files on civilians not connected with the military and on nonviolent organizations as part of its domestic intelligence-gathering operations.

The Pentagon issued carefully worded statements in response to questions submitted two weeks ago by reporters whose interest was aroused by a former intelligence officer's magazine article.

Former Army Capt. Christopher H. Pyle charged in the article, which appeared in the January issue of The Washington Monthly, that the Conus (for Continental U. S.) Intelligence Branch of the Army Intelligence Command "has gone far beyond the limits of [the Army's] needs and authority in collecting domestic political information."

Their Justification

The Army said it gathered political intelligence "in connection with army civil disturbance responsibilities." But it denied publishing a book that Pyle said was known in the intelligence community as "The Blacklist."

The Army however, conceded that it "does maintain an identification list sometimes with photos, of persons who have been active in past civil disturbances activity."

It said its information was obtained from "federal, state and local law enforcement agencies."

The Army acknowledged having a computerized data bank on potential civil disturbances, but denied that it extracted and kept separate computerized files on local political activists.

"Civil disturbance incident reports from field units are transmitted over a U. S. Army Intelligence Command-dedicated automatic voice network teletype system to the U. S. Army Intelligence Command headquarters at Fort Holabird, Md.," the Army statement said.

"Information on incidents by types and geographical location is placed into the data bank from key-punch cards for analysis of trends and identification of potential trouble spots.

"This is incident information only and does not include individual biographies or personality data."

The Army said it kept civil disturbance files separate from its files on the 7 million persons who have been investigated before receiving Army security clearance.

Pyle had charged that the two kinds of files were to be integrated to give the Army a vast library on civilians.

AFFIDAVIT/SPEISER

I, Lawrence Speiser, Esq., being of full age and duly sworn upon my oath, do depose and say:

1. I am the attorney for plaintiffs in the above-captioned cause of action.

2. I make this affidavit in support of plaintiffs' application for emergency relief, to wit, the granting of temporary restraining order, pending final hearing and determination of the request for permanent injunctive relief.

3. Plaintiffs seek this relief because of the threat posed by the following facts, the continuation of which would result in irreparable injury to plaintiffs and other organizations and person similarly situated:

A. On February 17, 1970, a complaint was filed by plaintiffs in the United States District Court for the District of Columbia requesting declaratory, injunctive and other appropriate relief against the surveillance, collection, maintenance, storage and distribution of information about the lawful and peaceful civilian political activities of plaintiffs and persons and organizations similarly situated within the United States by defendants, their agents, employees, and others acting in concert with them, which infringes upon the right to engage in lawful political activity protected by the First Amendment to the Constitution of the United States. Subsequent to the filing of this complaint, I received a letter dated February 25, 1970 from Mr. Robert E. Jordan, III, Army

General Counsel and Special Assistant for Civil Functions to defendant Stanley R. Resor, Secretary of the Army, identical to that received by more than thirty members of Congress, admitting that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to go beyond the Army's mission requirements." Specifically, Mr. Jordan admitted that the U.S. Army Intelligence Command has published "an identification list which included the names and descriptions of all individuals who might be involved in civil disturbance situations," and has "operated a computer data bank" containing information about "potential incidents and individuals . . . not required to support potential Army civil disturbance mission." A copy of this letter is attached as Exhibit A to this affidavit in support of plaintiffs' order to show cause.

B. Subsequent to the filing of the complaint in the above-captioned cause of action, but prior to the admission of these unauthorized and constitutionally impermissible activities by the Army General Counsel, the defendants secretly ordered the immediate destruction of a variety of records, including records which this court must inspect if it is to grant effective relief to the plaintiffs and all persons and organizations similarly situated. Unless the defendants are immediately restrained by this court, plaintiffs believe that Army intelligence agents will destroy all documents by which this court can verify that the offending blacklists, computer tapes and cards, records, photographs, reports, microfilm, and other materials have, in fact, been destroyed. Plaintiffs base this belief upon the following information:

(1) Subsequent to the publication on January 9, 1970 of an article by Christopher H. Pyle, former Captain in Army Intelligence, entitled "CONUS Intelligence: The Army Watches Civilian Politics" in the January, 1970 issue of *The Washington Monthly*, defendants have evaded or ignored most legitimate press and Congressional inquiries. Except for a short period in mid-January, 1970 when the Pentagon Office of Public Information admitted use by the Army of 1,000 plainclothes agents, a

teletype network, and undercover operations to collect information on lawful civilian political activity,* the defendants have evaded legitimate inquiry, as to the scope of their civilian intelligence network. See speech by Senator Sam Ervin before the United States Senate on March 2, 1970, attached hereto as Appendix C, and letter from Senator Ervin to Secretary of the Army, Stanley M. Resor on February 27, 1970, attached hereto as Appendix D. At the same time, however, they secretly issue orders to destroy the Blacklist maintained by the Intelligence Command for destruction and to discontinue the computerized domestic intelligence data bank maintained at Ford Holabird, Maryland. See letter to Lawrence Speiser from Robert E. Jordan, III, attached hereto as Appendix A.

(2) Defendants did not officially reply to Congressional inquiries until after Representative Cornelius Gallagher (D. N.J.) threatened to convene the Special Subcommittee on Invasion of Privacy to inquire into the Army's domestic intelligence activities. See News Release from Congressman Gallagher attached hereto as Appendix E. Inquiries directed to defendant Resor from Senator Sam Ervin (D. N.C.) and Senator Abraham Ribicoff (D. Conn.), attached hereto as Appendices F and G respectively were not officially replied to until Feberuary 25, 1970 when Robert E. Jordan, III, Army General Counsel, replied in the aforementioned letter, attached as Appendix A to this Affidavit. The bulk of Mr. Jordan's letter was not responsive to the questions posed by these members of Congress, particularly as to question 16 posed by Senator Ervin (Exhibit F) requesting information describing all data banks maintained by the Department of the Army on private citizens. Thus, defendants are believe to have concealed from lawful inquiry the existence of:

(a) a large microfilm data bank indexed by computer and maintained by the Counterintelligence Analysis Division (CIA) of the Office of the Army Assistant Chief of Staff for Intelligence;

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* See New York Times story, Tuesday, January 27, 1970, attached hereto as Exhibit B.

(b) a second computerized domestic intelligence data bank maintained by the Continental Army Command at Fort Monroe, Virginia:

(c) regional data banks maintained by the G-2s of the First, Third, Fourth, Fifth and Sixth Armies, and the Military District of Washington;

(d) regional data banks maintained by the 108th, 109th, 111th, 112th, 113th, 115th, 116th, and 902nd Military Intelligence Groups and the 710th Military Intelligence Detachment; and

(e) cards and documents stored at the U.S. Army Intelligence Command's Headquarters from which the computerized data bank was organized and made operable.

(3) In addition, defendants have refused to reveal to the press or to members of Congress the existence of a second and larger blacklist believed to be published by the Counter-intelligence Analysis Division of the Office of the Assistant Chief of Staff for Intelligence, a two-volume, yellow covered, looseleaf publication entitled *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest*, which describes numerous individuals and organizations unassociated with either the Armed Forces or with domestic disturbances.

C. Upon acknowledgement by the defendants that data banks existed which contained information about the lawful political activity of civilian persons and organizations contained in the letter from Robert E. Jordan, III, Army General Counsel, (Exhibit A), it was admitted that several of these computerized intelligence gathering operations would continue in existence despite the decision made to withdraw and destroy the identification list. Further, although Mr. Jordan states that the civil disturbance information bank has been "discontinued" there is no indication of the disposition made of the information contained in these discontinued data banks, leaving it possible for such data to be re-assembled in one or more of the remaining data banks still in operation. See, news story, "Fort Sam File Watches Civilians," San Antonio, Texas *Express and News*, Sunday, March 1, 1970, attached hereto as Appendix H; "Army Still Holds on to Its Civilian Dossiers," San

Francisco *Examiner, Saturday,* February 28, 1970, attached hereto as Appendix I.

D. On Febr ary 27, 1970, Senator Sam Ervin wrote again to defendant Resor requesting further information about Army Intelligence data banks and other intelligence gathering operations relating to lawful civilian political activity because of his concern about "unjustified interference by the Army into domestic political activities." (Appendix D) In a statement delivered to the United States Senate on Monday, March 2, 1970, Senator Ervin pointed out the serious constitutional defects inherent in the present Army Intelligence system which engages in the surveillance, reporting and storage of information relating to individuals and organizations engaged in lawful civilian political activity protected by the First Amendment to the United States Constitution, and indicated his concern that there might be "other files and data banks on civilian politics maintained in the Pentagon and elsewhere about the country under the authority of the Army Intelligence Groups." In addition to these concerns, Senator Ervin expressed concern over the lack of information as to when and how the data system mentioned in Mr. Jordan's letter was discontinued or destroyed, particularly where the issue involved is constitutionally impermissible survillance of lawful, peaceful civilian political activities by plaintiffs and other persons and organizations similarly situated.

4. Plaintiffs share the concern expressed by Senator Ervin. The effect of defendants activities pursuant to the collection, maintenance and distribution of information relating to lawful civilian political activity will be to intimidate plaintiffs and others similarly situated and deter them from exercising their rights of political expression, protest and dissent from governmental policies protected by the First Amendment by invading their privacy, and by posing the fear of loss of employment, reputation, or unknown injuries which would result in the diminution of lawful protest activity protected by the First Amendment because of the possibility of becoming included in the widespread civilian data bank and intelligence network maintained by defendants. The addi-

tional publicity given to the admission by the Army that it maintains civilian dossiers and data banks increases this intimidation. The indication that some information has been withdrawn or discontinued without any assurance that it is not duplicated in another data bank provides no lessening of the irreparable nature of the injury suffered by plaintiffs and persons and organizations similarly situated. Because of the critical nature of First Amendment rights, this court has the power to grant the relief herein requested, to prevent irreparable injury pending final determination of the constitutionality of defendant's challenged intelligence network. In order that debate on public issues be uninhibited, robust and wide open, plaintiffs and other similarly situated must not be deterred in the exercise of First Amendment rights by governmental action which exceeds constitutional or statutory authority and places an impermissible restrain upon these rights. Granting the temporary relief requested herein by plaintiffs will allow this court to assure that these rights will receive the protection they deserve and will serve as an aid in final determination of the merits of the cause of action by ensuring that any disposition ordered to be made by this court will be in compliance with constitutional safeguards and without the danger of duplication of files, records, or other actions which might frustrate the constitutional purpose.

Subscribed and sworn to
before me this (day of March,
1970.

APPENDIX A TO SPEISER AFFIDAVIT

Mr. Lawrence Speiser
Director
Washington Office
American Civil Liberties Union
Suite 501
1424 16th Street, N.W.
Washington, D.C. 20036

26 Feb 1970

Dear Larry:

This is in response to your letter concerning an article which appeared in the *Washington Monthly* entitled "CONUS Intelligence: The Army Watching Civilian Politics" by former Army Captain, Christopher Pyle.

The allegations made by Mr. Pyle were viewed with great concern by both the civilian and the military leadership of the Army. Both have always, over the generations, been keenly sensitive to the long-standing American tradition separating the military from involvement in domestic politics, and both are constantly alert to ensure that Army actions as well as policies are in keeping with the traditional limitations upon our armed forces. Ever since the unfortunate necessity arose, several years ago, for military forces to be prepared for civil disturbance operations when directed by the President, there has been a special sensitivity to the immediacy of this problem.

Our continuing goal has been to maintain suitable limits to Army intelligence involvement in the civilian sector, and toward this end our policies and practices have been undergoing periodic examination. The main charge of the article, and indeed its title, hold that the Army deliberately seeks the opposite, by widespread aggresive, covert collection of intelligence about people who "might make trouble for the Army." This charge is false. The Army's domestic intelligence activity has been to a small degree in the civil sector, but only to focus upon civil disorder, and the Army has long been pressing

to have civilian governmental agencies meet even these intelligence needs.

The military security functions of the Army in the United States are conducted by the U.S. Army Intelligence Command, Fort Holabird, Maryland. This Command reports directly to the Chief of Staff of the Army and is closely supervised for him by the Assistant Chief of Staff for Intelligence. The Command employs seven subordinate organizations, military intelligence groups, located throughout the United States in support of its military security functions. These groups, employing approximately 1000 agents, support the principal missions assigned to the Intelligence Command by the Department of the Army.

The principal activity of the U.S. Army Intelligence Command is to conduct security investigations to determine whether uniformed members of the Army, civilian employees and contractors' employees should be granted access to classified information. This activity and allied activity relating to security matters account for 94% of the time of Intelligence Command field personnel, and will consume a higher percentage in the future because of reduction in civil disturbance activities.

To avoid duplication of effort and to give investigators the benefit of prior work, a central filing system of Army investigations is necessary. The U.S. Army Investigative Records Repository, run by the Intelligence Command, has approximately 7 million files relating principally to security, loyalty or criminal investigations of former and present members of the Army, civilian employees and contractor personnel. When security or criminal investigations are completed the entire report is forwarded to the Records Repository at Fort Holabird for filing. The use of these files is limited by Regulation to specifically authorized Executive Branch agencies. No computer has been installed in the Investigative Records Repository; none has been or is planned to be installed since the cost in manpower and time to convert the Repository files to a computer bank would be prohibitive.

The Repository does have an automatic retriever system for some of the files; these files, placed in boxes, can be mechanically retrieved on a trolley system in order to save time in searching for files.

In order that investigative efforts in the security field would not be duplicated, Secretary of Defense McNamara directed on 27 May 1965 that a central index of all security investigations conducted by Department of Defense agencies be established. Accordingly, the Defense Central Index of Investigations was established at Fort Holabird. Data included in this Index is limited only to the identification of an individual, the type of investigation conducted, date of completion, and the location of the investigation (for example, Army investigations are filed in the Investigative Records Repository). The data is placed on manually key punched cards which are then alphabetically filed. A sample card is attached. At present, these cards must be manually searched. A plan to install a computer at the Central Index has been approved. Information on the key punched cards will be placed in the computer; the purpose of this computer will be to rapidly identify and indicate the location of files needed in security investigations. The computer will contain only the information shown on the sample card, which does not reflect the existence of any personal information of any kind, derogatory or otherwise. The present system and the planned computer are not and will not be tied in with any form of computer data banks. There is no plan to use the Central Index in any other fashion.

The U.S. Army Intelligence Command also has missions relating to the collection of information that may be needed by civilian planners and Army commanders in the event Federal troops are directed to act by the President. As you know, the Army has certain obligations under the Constitution and the laws to act at the direction of the President to deal with civil disturbances beyond the capability of local and state authorities to control. Army intelligence activities in the field of civil disturbances are directed primarily at ascertaining information needed to prepare appropriate levels of alert

for military forces and needed by military commanders if they are directed to act. This limited field of interest removes from legitimate concern of the Army minor forms of disturbances and lawful activities not likely to lead to major disturbance involving use of Federal resources.

Intelligence personnel obtain this limited civil disturbance-related information primarily from the FBI and state and local police agencies. When this information is collected in the field, it is reported usually by teletype to the U.S. Army Intelligence Command. The Director of Investigations, U.S. Army Intelligence Command, is responsible for collecting the information, storing it, and forwarding it, as necessary, to appropriate officials in the Department of Defense. The teletype is not linked to any computer, nor has there ever been a plan to do this.

The collection of civil disturbance-related information by the Army increased after the disturbance in Detroit in 1967. However, the Intelligence Command was not and has never been reinforced with additional personnel to accomplish the civil disturbance missions assigned to them at that time. Since this was a new area for the Army, an appropriate level of action necessary to accomplish the Army's mission had to be evolved. This area has been a subject of constant attention and refinement in order to narrow the Armys actions to only those which are absolutely necessary. There have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission rquirements. For example, the Intelligence Command published from 14 May 1968 to 24 February 1969, an identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations. All copies of the identification list have been ordered withdrawn and destroyed. The Army's present policy is that reporting of civil disturbance information is limited to incidents which may be beyond the capability of local and state authorities to control and may require the deployment of Federal troops.

In the past, the Director of Investigations at the Intelligence Command has operated a computer data bank for storage and retrieval of civil disturbance information. This data bank, which included information about potential incidents and individuals involved in potential civil disturbance incidents, was though useful in that it permitted the rapid retrieval of related information for predicting trends and possible reactions. The civil disturbance data bank was discontinued since, after study, it was determined that the data bank was not required to support potential Army civil disturbance missions.

Thus the Army does not currently maintain, and has ordered the destruction of, the identification list referred to above. No computer data bank of civil disturbance information is being maintained, and directives provide that no such system can be initiated without the approval of the Chief of Staff and the Secretary of the Army.

I hope that the information set out above will satisfy your concerns.

Sincerely,

/s/ Robert Jordan
ROBERT E. JORDAN, III
General Counsel

Attachment
As stated

SAMPLE CARD

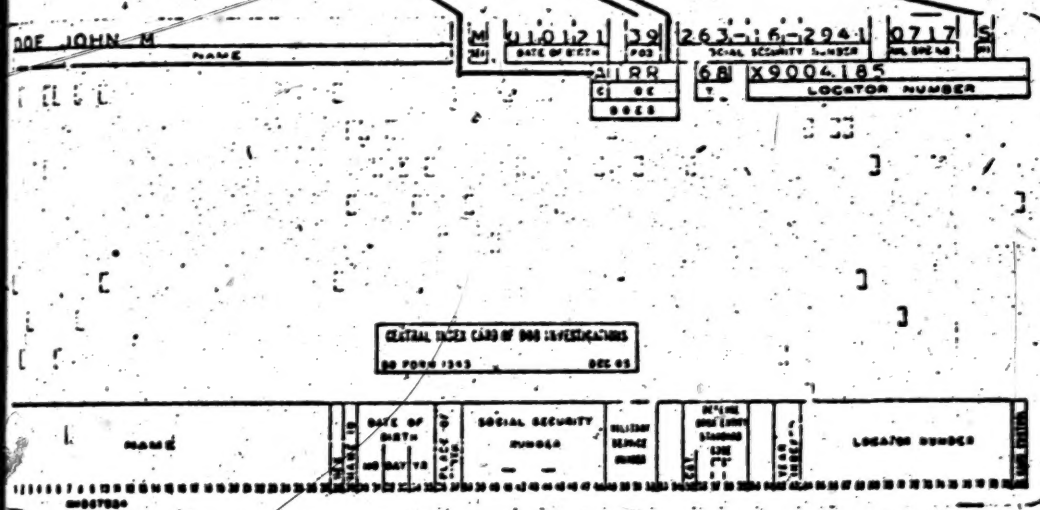
DEFENSE CENTRAL INDEX OF INVESTIGATIONS

DOD Component (Army file)

Place of Birth (By state code)

Location of File (Investigative Records Repository

Type of Investigation (Subject of investigation)



The holes punched on the card preserve in punched form only the information which is also type-printed on the card.

APPENDIX C TO SPEISER AFFIDAVIT

Speech by Senator Sam J. Ervin, Jr.
March 2, 1970

PRIVACY AND ARMY DATA BANKS: CONSTITUTIONAL RIGHTS AND MILITARY WRONGS

Last month, as part of the Constitutional Rights Subcommittee study of privacy, we addressed inquiries to the Army Department and other agencies asking about the amount and kinds of personal information they have on people, where it comes from, whether or not it is in computers, who uses it and if the individual has a chance to review and reply to it.

Our purpose in doing this is to determine whether or not Federal data banks are being developed in accordance with respect for Constitutional standards of privacy and due process of law for the individual citizen. Another purpose is to help Congress ascertain the need for comprehensive legislation to govern all data banks the government operates on individuals.

I have received a reply to our inquiry from the Army Department which provides a remarkable demonstration of the need not only for new laws but for a new agency to regulate data banks and protect individual privacy and constitutional rights where government records are concerned.

In response to many complaints, we asked the Secretary of the Army particularly to explain reports of information filed at Fort Holabird on the personalities, the political, economic, and social beliefs on the lawful community activities of American citizens. We asked him also to describe in detail the collection and storage of intelligence and other investigative data on private individuals at the Investigative Records Repository and at other Army data centers. In addition, we asked for citations and copies of the statutory and administrative authority on which he relies for this data collection.

The Army Department, in a partial response to my letter, has corroborated the complaints received by Congress. According to their letter, the Army Intelligence Command maintained, and, indeed, still does maintain, information on civilians. In one location alone, the Army Investigative Records Repository, 7 million files are kept on former and present members of the Army, civilian employees and contractor personnel. These relate principally to security, loyalty, and criminal investigations. However, beyond saying that use of these files is "limited by regulation to specifically authorized Executive agencies" and that no computerization has occurred or is planned, no further light is shed on the overall purpose and management of these files. Nor are any statutes and regulations cited. I hope this information will be forthcoming in the final reply.

The Army Intelligence Command keeps still other files on individuals. These they justify under their "Missions relating to the collection of information that may be needed by civilian planners and Army commanders in the event Federal troops are directed to act by the President." These activities by the Army were increased reportedly after the Detroit disturbance in 1967.

In furtherance of this non-military mission, the Army stockpiled an amazing arsenal of weapons. First, in the best tradition of military precision, efficiency and economy, the Army Intelligence officials admittedly set up a computer data bank with information about "potential incidents and individuals involved in potential civil disturbance incidents." They confess that they though this would be useful in "predicting trends and possible reactions."

Another weapon they developed wa a list which included the "names and descriptions of individuals who might be involved in civil disturbance situations."

The business of the Army in such situations is to know about the conditions of highways, bridges, and facilities. It is not to predict trends and reactions by keeping track of the thoughts and actions of Americans exercising First Amendment freedoms.

If ever there were a case of military overkill, this is it.

Regardless of the imaginary military objective, the Chief casualty of this overkill is the Constitution of the United States, which every military officer and every appointed official has taken an oath to defend.

It is to the lasting credit of Secretary of the Army Resor and General Counsel Robert Jordan that after the inherent dangers to constitutional liberties in this program were pointed out to them, some immediate action was inititaed.

Mr. Jordan reports that the identification list has been withdrawn and destroyed, and one computer data bank has been discontinued. He states that no computer data bank is now being maintained for storing such information about civilian politics, and that directives provide that no such system can be initiated without the approval of the Chief of Staff and the Secretary of the Army.

While the Army's response is commendable, it raises more questions than it answers, and it leaves a great many of the old questions unanswered.

Since I view this as an interim response to the Subcommittee's inquiry, I shall await with interest the Army's final and comprehensive reply to our questions.

We should like to know when and how that particular computer data bank was discontinued and whether that information is duplicated in other Army files and microfilms. The essential factor here was not necessarily the computerization of the files, but the fact of the Army surveillance of citizens. We should still like to know about other files and data banks on civilian politics maintained in the Pentagon and elsewhere about the country under the authority of the Army Intelligence Groups.

We should like to know how many copies of the identification list were issued and how frequently? In addition, we still require copies of directives and regulations governing the current information collected and stored under the new policy for "civil disturbance" as well as for other purposes at Fort Holabird and elsewhere by the Army.

I have informed the Secretary of the Army of our continued interest in receiving the answers to our ques-

tions and in receiving a copy of the new directive concerning establishment of new computerized data systems. I hope this marks the beginning of a trend and that more directives will be forthcoming concerning access to review and use of the old information they already have on hand.

Although I have little, if anything, in common with the attitudes and view of some of the persons who are probably in the Army files, the very existence of such unconstitutional surveillance by the Army is, I believe, destructive of our form of government.

The Army Department states that it "has long been pressing to have civilian governmental agencies meet needs of domestic intelligence." Obviously, and perhaps fortunately, someone in those agencies is vetoing the idea.

If the President of the United States determines that new forms of intelligence gathering activities are necessary to enforce the laws, let him so inform the Congress, and let Congress assign the responsibilities to an appropriate civilian agency.

I suggest the Army regroup and redefine their strategic objectives, lower their sights, and re-identify their enemy. Under our Constitution that enemy is not the American citizen.

APPENDIX D TO SPEISER AFFIDAVIT

U.S. SENATE
SUBCOMMITTEE ON
CONSTITUTIONAL RIGHTS

Washington, D. C., February 27, 1970.

Hon. Stanley R. Resor,
Secretary of the Army,
The Pentagon,
Washington, D. C.

DEAR MR. SECRETARY: Thank you for your interim reply to the Subcommittee's inquiry of January 22, 1970, in connection with our study of privacy and data systems.

I wish to commend you and the General Counsel of the Army for the prompt and effective action you have taken to reduce the Army Department's involvement in domestic intelligence work, I was gratified to learn that you have discontinued the computer data bank which was maintained on "potential incidents and individuals involved in potential civil disturbance incidents." Furthermore, the fact that you have ordered the withdrawal and destruction of a list of people who might be involved in civil disturbances is also laudable, and will be reassuring to those in Congress concerned with constitutional rights.

My inquiry of January 22, as you know, was not limited to information collected for possible civil disturbances, nor was it confined to files kept at Fort Holabird.

Since Mr. Jordan's letter deals only with one Fort Holabird computer data bank, and does not refer to other similar civil disturbance data banks and data systems not necessarily computerized, which are reportedly maintained by the Army in the Pentagon and in the various Intelligence Groups, I hope that your final

reply will complete your response to our inquiry, especially to Question 16.

His letter does not, furthermore, deal with the questions raised concerning the information which he indicates is currently being maintained under the new policies. In addition, it does not answer our inquiries concerning other information kept on file about civilians.

With your final reply, I hope that you will comply with the Subcommittee's request for the pertinent regulations, statutes, directives, and other authority to which Mr. Jordan generally refers.

Since Mr. Jordan states that the Army has urged that other civilian agencies take over the task of domestic intelligence, we should be interested in knowing what specific recommendations have been made in this matter.

While the Department is to be commended for the prompt action to remedy, at least partially, this unjustified interference by the Army into domestic political activities, this does not explain how the Army was permitted to engage in such activities in the first place. The preservation of our civil liberties cannot depend on the lucky discovery of illegal programs. Clearly, in our government of laws, no such activity should be undertaken secretly, as was this, nor without clear statutory and constitutional authorization from Congress.

With all kind wishes, I am,

Sincerely yours,

SAM J. ERVIN, JR.
Chairman.

APPENDIX E TO SPEISER AFFIDAVIT

Dear Mr. Secretary: Jan. 26, 1970

The most recent issue of *The Washington Monthly* contains allegations which are very disturbing to me. In an article entitled "CONUS Intelligence: The Army Watches Civilian Politics," by Christopher Pyle, it is charged that the Department of the Army is collecting dossiers on individuals who engage in legal protests around the United States or who are connected with activist groups. Among the organizations whose members are mentioned for inclusion in the Army's intelligence reports are the National Association for the Advancement of Colored People and the American Civil Liberties Union.

While many questions come to my mind about the Department of the Army maintaining such surveillance over the domestic affairs of our Nation, a source of particular concern is that this information is to be stored in, and disseminated from, a computerized data bank at Fort Holabird, Baltimore, Maryland. It appears that, should Mr. Pyle's article be totally factual, a nationwide data bank of extremely sensitive personality reports is being constructed at the Investigative Records Repository.

As Chairman of the Special Subcommittee on Invasion of Privacy, I conducted hearings on a suggested National Data Bank advanced by the Bureau of the Budget in 1966. Based upon my investigation, the Committee on Government Operations issued in August 1968 "Privacy and the National Data Bank Concept." As part of my continuing studies on that issue, I received a letter dated March 21, 1968, from the then Director of the Bureau of the Budget, Charles Zwick. The letter contained the following relevant comments:

> ". . . we will prepare a specific concrete plan which could be exposed to the critical review of a group representing the broad variety of interests in the matter. Only after that would we consider that we have a proposal for appropriate consideration by the Congress."

On January 15, 1970, Lawrence Speiser, Director of the Washington Office of the American Civil Liberties Union wrote to you on the issue of the computerized Investigative Records Repository. He referred to my agreement with the Bureau of the Budget and to the intense Congressional concern over computerized data banks:

> "Their concern was responsible for the review and reconsideration of plans for a national federal data center and the promise by the Bureau of the Budget that none would be created without prior Congressional approval. Also it was clearly understood That under no circumstances would raw investigative data ever be fed into any computer bank."

Mr. Speiser accurately reflects the understandings reached with the Bureau of the Budget about a National Data Bank. Yet, it would seem from Mr. Pyle's article that precisely the proscribed information is to be fed into what if it is not formally a National Data Bank, is, at the very least, a nationwide data bank.

I clearly recognize, Mr. Secretary, the necessity for some data to be at the disposal of the Department of the Army in order to meet its responsibilities to quell civil disorders and I would not quarrel with an attempt to isolate trouble spots around the country. However, I am deeply concerned about the implications of collecting dossiers on Americans who are pursuing constitutionally protected activities, especially when they are to be inextricably embedded in immediately available form in a computerized data system. I would, therefore, ask the following questions:

1. Is the article sufficiently substantive to describe the current data collection procedure and the eventual construction of a computerized data bank at Fort Holabird? If it is, have you discussed the National Data implications with the Bureau of the Budget or with any group concerned about the constitutional questions such a compilation and centralization of data would raise?

2. Is there any plan for the individual to be informed of the range of information on him in the bank and does

he have the possibility to file mitigating or ameliorating rebuttals? I note that Mr. Pyle indicates that at least some of the information in the Investigative Records Repository is based on newspapers stories and conjunct information which has not been subjected to judicial review for its accuracy or completeness.

3. Mr. Pyle states "The personality files are likely to be made available to any federal agency that issues security clearances, conducts investigations, or enforces laws." Should that sentence reflect current operating procedure, may I have your assurance that you are taking steps to make such interagency transfer unlikely, if not impossible?

4. What is the specific source of funds under which the Department of the Army is constructing this alleged nationwide data bank? How is it connected to the mission of the Department of the Army to collect and store such sensitive information in a computerized data bank which, according to Mr. Pyle ". . . will specialize in files devoted exclusively to descriptions of the *lawful* political activity of civilians." (Emphasis in Original)

It is entirely possible, Mr. Secretary, that Mr. Pyle's article is an inflated estimate of what is being collected, what will be contained in the nationwide computerized information system, and who will have access. I would hope that you could report to me that that is true, for it would represent an unconscionable and unconstitutional threat to the privacy and spontaneity of Americans if *The Washington Monthly* has accurately described the Investigative Records Repository at Fort Holabird. I anticipate your prompt reply to the questions contained in this letter.

With continued best wishes,

Sincerely,

CORNELIUS E. GALLAGHER, M.C.

cc: Hon. Robert Mayo, Director, Bureau of the Budget

APPENDIX F TO SPEISER AFFIDAVIT

Hon. Stanley R. Resor, Jan. 22, 1970
Secretary of the Army,
Washington, D.C.

Dear Mr. Secreatry: In connection with our study of computers, privacy and constitutional rights, the Constitutional Rights Subcommittee is conducting a survey of the development and maintenance of data banks by Federal departments and agencies.

One of our purposes is to determine whether or not such data systems are bing developed in accordance with constitutional standards of privacy and due process of law for the individual citizens involved. Another purpose is to help Congress ascertain the need for comprehensive legislation to govern all computerized data banks on individuals.

Our attention has been particularly directed to reports of the development and expansion of data banks at Fort Holabird, containing information on the personalities, on the political, economic and social beliefs and on the lawful community activities of American citizens.

To assist the Subcommittee in its study, we should appreciate your explaining for us (1) the present situation concerning collection and storage of Army intelligence and other investigative data on private individuals, particularly at the Investigative Records Repository, but also at other data centers operated by the Army; and (2) future plans for expanding and further computerizing the present system.

Specifically, we should receive responses to the following questions:

1. Under what statutory and administrative authority was the Investigative Records Repository established, and for what purpose? What is the relationship of this activity to the responsibilities of the Armed Forces? Please supply copies of pertinent statutes, regulations and memoranda.

2. Is all military intelligence data on individuals filed in this center? Is it computerized?

3. How many subject individuals are presently recorded in the system at the Records Center?

4. What categories of information about individuals are contained in this data bank? Are there any published or unpublished regulations or instructions governing the type of information appropriate for the files, how is it to be gathered, and how its accuracy is to be determined? If so, please supply copies.

5. Are there plans to extend the scope of these files in number and subject matter? If so, how would this specifically alter the existing data system?

6. Is the subject individual, or his representative, allowed to review the data on record about him, to supplement his file and to explain or rebut material he considers inaccurate?

7. What provisions are made deleting material found to be inaccurate or inappropriate, either spontaneously by the Army or on motion of the individual concerned?

8. What limitations are placed on access to the file or to information contained in it? What security procedures or devices are employed to prevent unauthorized access to the data file or improper use of the information? Who specifically has access to this data? For what reasons and on what authority is access granted?

9. What other agencies have access to these files? For what purposes? Under what restrictions?

10. Is a record maintained of the details of inspection or use of the file or data on an individual?

11. How is this information collected and by whom? Is it collected by investigators or from third parties? Is it solicited from the individual himself, or is it collected from other records?

12. Do you have published or unpublished regulations or guidelines concerning use and availability of these files? If so, please supply copies.

13. Do you have published or unpublished regulations or guidelines concerning the gathering, screening and accuracy of data in these files? If so, please supply copies.

14. To what extent are these files computerized? What are your plans for computerizing further?

15. The Subcommittee is interested in learning the truth about current reports that the Army plans to connect its intelligence teletype reporting system to a computerized data bank at the Investigative Record Repository. If so, what are your plans for safeguarding the accuracy of the data collected and its relevance to the area of your responsibility?

16. What other data banks are maintained or supported by the Department of the Army on private citizens? To the extent possible, please supply for each of these the information requested for the Fort Holabird data banks.

Enclosed is a *Congressional Record* excerpt describing the scope of the Subcommittee's interest in the government's use of data banks on individuals.

Your assistance in our study is deeply appreciated.

With all kind wishes, I am,

Sincerely yours,

SAM J. ERVIN, JR.
Chairman.

AFFIDAVIT OF THADDEUS R. BEAL
UNDER SECRETARY OF THE ARMY

I THADDEUS R. BEAL, being duly sworn, depose and state that I am the Under Secretary of the Army and have held this position since 8 March 1969. I am familiar with the complaint in the case of *Tatum* v. *Laird*, which has been filed in the District Court for the District of Columbia, and the activities of the Department of the Army complained of therein.

Pursuant to the authority set forth in Title 10, United States Code, sections 331, 332, 333 and 3012, Executive Order 10450, 27 April 1953, 3 CFR, 1949-1953, Comp., p. 936, and Department of Defense Directives 5210.7, 5210.8, 5210.9 and 3025.12 (8 June 1962, 32 CFR 187.1 *et seq* to .329) the intelligence activities of the Department of the Army within the Untied States relate pertinently to (1) personnel security investigations, in order to determine whether civilian and military employees of the Army and employees of Defense contractors can be granted access to classified information, (2) special investigations pertaining to loyalty and espionage matters, concerning civilian and military employees of the Army, and (3) the gathering of information concerning activities which may adversely affect the mission or security of the Army, or require the Army to deploy its troops to assist civilian authorities in restoring stability when so ordered by the President.

Completed investigative records are kept in a central file located at the U.S. Army Investigative Records Repository. Army Regulations require that the files in the Records Repository be carefully controlled and access to the files be limited to those with a strict "need-to-know." It is the firm policy of the Department of the Army that any adjudications based on these files will be made only after an entire investigative file has been reviewed. Accordingly, the files in the Records Repository are not summarized and are not computerized in any way.

In order to further assist in these investigations, the Department of the Army maintains, for the Department of Defense, the Defense Central Index of Investigations.

This Index, which will be computerized shortly, is designed to locate all security and criminal investigative files maintained by the military departments. This Index also does not contain any information indicating the nature or the conclusions of the investigations in question. The sole purpose of this Index is to locate files in order to reduce the time for investigations.

The Department of the Army has primary responsibility among the military services for planning for and rendering assistance to civil authorities in civil disturbances. 32 CFR Secton 501.1(b).

With respect to the employment of military resources in the event of civil disturbances the Department of the Army has been charged by the Department of Defense to, among other things, provide essential intelligence data to ensure that appropriate military authorities are prepared to render assistance to local civilian authorities when ordered to do so by the President under constitutional and statutory authority. The Army is also charged with keeping the Secretary of Defense informed of unusual military resource requirements (actual or potential) and other significant developments in connection with civil disturbance plans and operations. 32 CFR Section 187.6 (a)(8). In the performance of this intelligence mission the Department of the Army must be fully and currently informed on all matters relating to the potential involvement of Federal troops in civil disturbance matters.

Army intelligence activities in the field of civil disturbance are directed primarily at ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act. The Army cannot simply wait until there is an actual requirement to deploy troops before information about a disturbance is collected. Considerable advance time is needed in order to place troops on alert, prepare troops to move, secure necessary aircraft, actually move troops, and have them available for deployment. Consideration must be given to having forces available for possible use in different locations with civil disturbances as well as in international operations. When a unit is placed in an alert posture and

required to be ready to depart its home station within a few hours, normal training must cease and troops must prepare for departure. Military officials must exercise care that troop units are not placed on alert too frequently, or for excessive periods of time.

The time needed to move troops to a civil disturbance area, coupled with the problems which arise whenever short alert times are necessary, require that the Department of the Army keep itself informed in advance as to potential situations where troops may be necessary. Accordingly, collection of information in advance of the time when federal troops are committed by the President is necessary. It is important to recognize that the Army is not concerned with minor disturbances or lawful activities not likely to lead to major disturbances where federal troops may be needed. It is also important to note that the overwhelming bulk of information received by the Army is collected from federal, state and local agencies.

In addition, the Department of the Army, as part of its civil disturbance mission, must be in a position to analyze information in order to prepare necessary civil disturbance plans. To this end, the Counterintelligence Analysis Division in the Office of the Assistant Chief of Staff for Intelligence, which is responsible for worldwide counterintelligence analysis, maintains and collects information from other federal agencies. For example, for planning purposes the Army must determine cities where there is a high potential for violence so that appropriate plans can be developed. It is the function of the Counterintelligence Analysis Division to answer questions of this nature and to this end information is collected from other Federal agencies.

As a result of a review of the intelligence activities of the United States Army it has been determined that certain records maintained by the Army were not useful and were not necessary in view of the Army's mission. These records include the identification lists which the plaintiffs have erroneously described as a "black list" and the computer data bank containing civil disturbance information developed by the United States Army Intelligence Command. Accordingly, all such records main-

tained by the United States Army Intelligence Command, or otherwise under Army control, have been destroyed. I have directed that one copy of the identification list and one print out of the bulk of the information in the data bank be retained as long as necessary in connection with the litigation in *Tatum* v. *Laird.*

Additionally, field commands initiate spot reports concerning imminent or existing incidents. These spot reports are routinely destroyed after 60 days. I have directed that one copy of all such reports now in existence, or hereafter reported, be similarly retained as long as is necessary in connection with the *Tatum* suit.

The Department of the Army is continuing to review its activities and may direct that other data be destroyed. In such an event, one copy of each item destroyed will also be retained so long as is required by the *Tatum* case.

Based upon my knowledge of the intelligence activities of the Department of the Army, any order which would bar or limit such activities, or change the custody of the department of the Army records or require that they be destroyed, or not be destroyed, would interfere with the accomplishment of the Army's mission and could endanger the national security or harm the public interest.

/s/ Thaddeus R. Beal
Under Secretary of the Army

MOTION TO DISMISS

Now come the defendants, by their undersigned attorneys, and respectfully move this Honorable Court to dismiss this action on the grounds that there exists no justiciable issue, case or controversy and no basis for the granting of equitable, declaratory or other relief; that plaintiffs' suit is in law and fact a suit against the United States to which the United States has not consented and is barred by the doctrine of sovereign immunity and is also barred by doctrine of separation of powers; and that the Court is without jurisdiction over the subject matter of this action.

In support of this Motion to Dismiss the Court's attention is respectfully invited to the attached Memorandum of Points and Authorities and to the affidavit of Thaddeus R. Beal, the Under Secretary of the Army dated March 19, 1970, which was filed in this Court on March 19, 1970, in support of defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction.

/s/ J. Walter Yeagley
Assistant Attorney General

/s/ Kevin T. Maroney
Attorney, Department of Justice

/s/ Benjamin C. Flannagan
Attorney, Department of Justice
Washington, D.C. 20530
RE 7-8200, Ext. 2333
Attorneys for Defendant

EXHIBIT A TO PLAINTIFFS' MEMORANDUM

February 2, 1970

Hon. Stanley R. Resor,
Secretary of the Army,
Washington, D.C.

Dear Mr. Secretary: I enclose a copy of an article from the January 1970 *Washington Monthly*, entitled "CONUS Intelligence: The Army Watches Civilian Politics." I would appreciate your letting me have the benefit of your comments on the article. In addition, I would appreciate your providing me with information in response to the following questions prompted by this article:

1. What is the legislative authority for domestic intelligence gathering activities by the Army involving political activities that are not directly related to military or civilian personnel matters;

2. How many people—military and civilian—work in the Army's domestic intelligence program?

3. What is the budget for FY 1970 and proposed for FY 1971 for domestic intelligence gathering, including military pay and allowances; What proportion of the budget is used for personnel investigations and similar intelligence work?

4. What is the justification for the Army to engage in surveillance of organizations or individuals involved in political protests?

5. What criteria are used in determining which activities to cover and report on?

6. How many meetings by civilian organizations were covered or reported on during the last year?

7. What, if any, arrangements exist between the Army and other government investigative agencies to prevent duplication of effort in keeping track of the activities of organizations under surveillance?

8. What periodic reports are filed concerning the activities of political protest groups? Please provide a copy of the latest report available of each type.

9. The article alleges that the Army publishes a booklet containing information on individuals and groups that might "cause trouble for the Army." Is there such a document; If so, please provide a copy of it and details on the distribution of it. Who has access to this information?

10. How many names of individuals and organizations does the Army currently have in its security files; Approximately how many were added in the last year that were not due to investigations for personnel purposes?

Sincerely yours, J. W. FULBRIGHT

APPENDIX F TO PLAINTIFFS' MEMORANDUM

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C. 20310

March 20, 1970

Honorable Sam J. Ervin
Subcommittee on Constitutional Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in further response to your letters about certain practices of Army intelligence and your Subcommittee's concern with privacy and data systems. The purpose of this letter is to answer the questions that you posed in your letters of 22 January and 27 February. While some of the information in this letter may repeat some of Mr. Jordan's comments to you, I have done this, where necessary, to help clarify the matter from the overall standpoint.

The present program governing access to classified information was established on 27 April 1953 in Executive Order 10450 (Encl 1). This Executive Order, and the programs developed by Federal agencies, recognizes the need for the Government to protect access to classified information. The Executive Order provides that the head of each Federal agency is responsible for establishing procedures governing security and sets out general standards to be applied. As a result, the Department of Defense has issued Department of Defense Directives 5210.8 (Encl 2) and 5210.7 (Encl 3); the Department of the Army, as well as the other Military Departments, has issued further implementing instructions.

The principal activity of the U.S. Army Intelligence Command is to conduct investigations to determine whether uniformed members of the Army, civilian employees and contractors' employees should be granted access to

classified information. In order to avoid duplication of effort and give investigators the benefit of prior work the U.S. Army Investigative Records Repository (USA IRR) was established on 17 August 1951 to serve as a central filing system for all Army investigations (Encl 4), and detailed instructions to field elements for centralizing files then located throughout the Army were issued on 18 January 1952 (Encl 5). You will note that these order provide that the USAIRR "is not an investigative agency and has no responsibility for the evaluation of information. . . ." This policy continues in effect today.

Since 1952 all Army security and criminal files have been centralized in the USAIRR. The USAIRR presently contains approximately 7 million files relating principally to security and criminal investigations of former and present members of the Army, civilian employees and contractors' employees. At present, the operating procedures and controls over the USAIRR are specified in Army Regulation 381-45 (Encl 6). There are no plans to expand either the scope of the subject matter of files in the USAIRR. As previously noted, no computer has been installed or is planned to be installed in the USAIRR.

The files maintained by the USAIRR relate to individuals within the Army's investigative jurisdiction; the other services maintain similar files. As noted in Mr. Jordan's letter to you, the Army operates, for the Department of Defense, the Defense Central Index of Investigations. This Index, designed to locate any security or criminal investigative file for any Defense agency, will be computerized shortly. As previously noted, the material in this Index is limited to identifying data such as name, date of birth, social security number, on individuals who have been the subjects of investigations and the location of the investigations.

It is estimated that approximately 1.1 million of the 1.9 million civilian and military employees of the Army require a security clearance in order to perform their jobs. When an individual is selected for or assigned to

a position requiring a security clearance, a request for an appropriate investigation is submitted, through channels, to the U.S. Army Intelligence Command. The Intelligence Command, depending upon the type of clearance sought will review the information submitted by the individual and direct military intelligence agents to conduct an appropriate investigation. This investigation, again depending upon the type of clearance requested, may consist of a check in the Defense Central Index of Investigations to see if other investigations have been conducted by DoD agencies, review of an existing file in the USA IRR, a check of local criminal records in areas where an individual has lived, interview with references, checks with former employees, etc. Each activity performed by an agent is reported to the Intelligence Command; the Intelligence Command is then responsible for resolving contradictory or conflicting reports through further investigation and checking out all undeveloped information. When the investigation is completed, the entire file is forwarded to the command which requested the investigation; that command (the clearance authority), and not the Intelligence Command is responsible for evaluating the investigation and determining whether a clearance will be granted.

When the clearance authority has completed action, the entire file is sent to the USAIRR. Accordingly, a standard personnel security file in the USAIRR will contain the papers submitted by the individual, reports submitted by the agents concerning their investigation, and copies of the action taken by the clearance authority in determining whether a clearance should be granted. I have attached copies of the types of documents which may be included in the file (Encl 7). In addition, the USAIRR contains completed criminal investigation files, completed investigative files dealing with espionage or security investigations involving the Army and files in the other categories specified in Army Regulation 381-45.

Under normal circumstances, an individual is not permitted to review material contained in his file at the USAIRR. Of course, the individual is provided with

copies of any statements which he submitted. However, according to paragraph 4-5, Army Regulation 604-5, a security clearance may not be denied or revoked unless the clearance authority explains the basis for the denial or revocation and affords the individual the opportunity to rebut the specific derogatory information against him; exceptions to this procedure can be granted only on a case-by-case basis by me. In addition, an individual may request an interview in order to clarify material in his file; this interview and the individual's rebuttal in a clearance proceeding are placed in the file. Thus an individual seeking a clearance should be aware of any derogatory information of significance in his file and no adverse action can be taken against him until he is so aware.

Information in a file at the USAIRR is, once action is completed, considered an historical record of the security clearance action. Accordingly, there is no procedure for removing or correcting documents in the file once action is completed. While an investigation is pending, the Intelligence Command makes every effort to limit information to appropriate matters relevant to the issues under consideration and, where conflicting evidence is developed, is expected to order further investigations.

Access to USAIRR files is strictly limited to those with a "need-to-know." Files are treated as if they contained Secret information so that special transmittal procedures are necessary to insure limited distribution. Access to files is limited to Department of Defense and other Government agencies with a legitimate interest in the personal security field. I have attached a copy of Army Regulation 381-46 establishing Army policy on the use of USAIRR files by non-Army agencies (Encl 8). I have also attached a book listing those authorized to request USAIRR files (Encl 9).

With reference to your questions about civil disturbance intelligence activities, I should point out that this activity is separate and apart from the USAIRR. As you noted in your letter of 27 February, Mr. Jordan's letter dealt primarily with the civil disturbance activities of the U.S. Army Intelligence Command. As noted in that

letter, the civil disturbance computer data bank at Fort Holabird has been discontinued and destroyed since the information in the computer was not useful in view of the Army's limited civil disturbance mission. "Spot reports" which provided the basis for entries into this computer have been routinely destroyed for some time. I have attached a copy of a memorandum signed by Secretary Resor on 5 March 1970, concerning the subject of computerized data banks within the Army (Encl 10). You will note that this memorandum prohibits the operation or establishment of any computer data banks concerning civilians or civilian activity unless the specific data bank is approved by the Chief of Staff and the Secretary of the Army. Your Subcommittee and other interested Committees of the Congress will be informed in these specific instances.

Under our current policies, reports concerning civil disturbances will be limited to matters of immediate concern to the Army—that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control. These reports will be collected by liasion with other Government agencies and reported by teletype to the Intelligence Command. They will not be placed in a computer (in fact, there never has been a direct link between the teletype reporting system and the computer). These reports are destroyed 60 days after publication or 60 days after the end of the disturbance. This limited reporting system will ensure that the Army is prepared to respond to whatever directions the President may issue in civil disturbance situations and without "watching" the lawful activities of civilians.

I should note that the Assistant Chief of Staff for Intelligence of the Department of the Army is responsible for providing analyses of matters of concern to the Army; to perform this function, the Counter Intelligence Analysis Division has been established in his office. This Division has a world-wide analysis function and is responsible for reviewing counterintelligence material for all Army areas of interest. The Division does not collate

information on a broad basis and only has information needed to answer specific questions of concern to the Department of the Army. This Division will, of necessity, have office files concerning civilian activity. For example, the Division is responsible for determining cities where civil disturbance potential is high so that Army officials can prepare civil disturbance plans. Such plans become the basis for the application of minimal force to restore stability when ordered by the President. In the course of this analysis, information is received from the FBI and collected in order to permit evaluation. These files, along with the world-wide counterintelligence files are stored on microfilm because of the volume of the latter; but they are not computerized and there are no plans to computerize them. In our view, the activities of the Counter Intelligence Analysis Division do not involve an invasion of privacy or constitute an improper activity for the Army to perform. The limited questions responded to by this Division in the civil disturbance field are ones of legitimate concern to the Army. The Division is closely supervised by the Assistant Chief of Staff for Intelligence and is not permitted to consider matters beyond its limited area of concern.

The Counterintelligence Analysis Division did compile an identification list from federal and local authorities on individuals and organizations associated with civil disturbances. This list was last updated in late 1969 and is available to a limited number of Department of Army organizations with civil disturbance responsibilities. The lists are now out of date, and are not considered necessary to satisfy the limited intelligence requirements referred to above. Accordingly, existing lists are being withdrawn from the field and destroyed, and new lists are not being prepared.

Your letter of 27 February expressed concern over how the Army could have engaged in the practices described in Mr. Jordan's letter. I believe it is important to place this matter in proper perspective. The Army provided troops to assist local authorities in controlling civil disturbances in Detroit and during the disturbances

following the death of Dr. Martin Luther King; prior to this time, Army troops had not been used for this purpose since 1942. Obviously, after the death of Dr. King, it was impossible to predict exactly what level of action the Army should adopt in order to be prepared to deal with disturbances if the President should direct the Army to act again. Thus the Army began to collect information in order to be prepared to meet its civil disturbance requirements. This collection, despite allegations to the contrary, never reached proportions even approximating the charge that the Army was "watching" civilian politics on a broad scale. Our continuing policy has been to reduce the scope of the Army's activities to only those needed to accomplish our mission; reductions in the level of activity have been made as our experience indicated that a given course of action was not required. In fact, our latest actions to reduce the level of intelligence activity have been under study for some time. The Vice Chief of Staff and I are both personally involved in this continuing review.

I hope that the information set out above will satisfy your concern. I will be happy to answer any further questions you may have or meet with you to discuss this matter.

Sincerely,

THADDEUS R. BEAL
Under Secretary of the Army

10 Enclosures
as stated

APPENDIX G TO PLAINTIFFS' MEMORANDUM

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C. 20310

March 20, 1970

Honorable Cornelius Gallagher
House of Representatives
Washington, D.C. 20515

Dear Mr. Gallagher:

This is in response to your request for further information about certain Army intelligence activities and data systems and their relationship to individual privacy. Some portions of this letter repeat information given to you by Mr. Jordan's previous letter and his discussion with you. I have done this in order to clarify the matter from the overall standpoint.

The principal activity of the U.S. Army Intelligence Command is to conduct investigations to determine whether uniformed members of the Army, civilian employees and contractors' employees should be granted access to classified information. The U.S. Army Investigative Records Repository (USAIRR) was established to serve as a central filing system for all security and criminal investigations. The USAIRR contains approximately 7 million files relating to these types of investigations. The overwhelming majority of these files are standard paper files. However, some of the older files, forwarded from field agencies for centralized storage at the USAIRR, are on microfilm. In addition, the USAIRR microfilms an average of 22 files per day. Only those files requested for use by remote Army agencies in connection with security adjudications are microfilmed in order to reduce the bulk for mailing and the risk of loss.

Army and Department of Defense policies provide that investigative files are not to be summarized and that

officials taking action based on these files should review the entire file. As Mr. Jordan's letter noted, the cards in the Defense Central Index of Investigations contain only basic information relating to the identification of the individual concerned and the location of the file. When USAIRR files are microfilmed for transmittal purposes, the entire file is microfilmed. There is no plan to microfilm all the files in the USAIRR; the cost and effort required for such an operation would be prohibitive.

With reference to your questions about the Army's civil disturbance intelligence activities, as Mr. Jordan pointed out, the Army has, for some time, been reviewing its intelligence activities with a view towards keeping these activities to the minimum essential for the Army to perform its mission. As noted by Mr. Jordan, the Intelligence Command published from 14 May 1968 to 24 February 1969, an identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations. The Assistant Chief of Staff for Intelligence of the Department of the Army directed on 18 February 1970 that all copies of this identification list be returned from Army field agencies to the Intelligence Command where they were to be destroyed. Destruction of these lists has begun and will be completed shortly.

As Mr. Jordan also noted, the Intelligence Command previously operated a computer data bank for storage and retrieval of civil disturbance information concerning incidents, which also captured certain information on participating individuals. The civil disturbance data bank was discontinued since it was determined that it was not required to support the Army's civil disturbance mission. The data bank was destroyed pursuant to orders issued by the Assistant Chief of Staff for Intelligence on 19 February. I have attached for your information a memorandum signed by Secretary Resor on March 5, 1970 concerning the subject of computerized data banks within the Army. You will note that this memorandum prohibits the operation or establishment of any computer data banks concerning civilians or civilian activity un-

less specifically approved by the Chief of Staff and the Secretary of the Army and after notice to your Subcommittee and other interested Committees of the Congress.

The information contained in the computer data bank was based primarily on "spot reports" submitted by military intelligence agents as a result of their liasion activities with other Government civilian agencies. The Army does not retain the original spot reports for more than 60 days since they relate to specific events and therefore are of transitory interest. As noted by Mr. Jordan, reporting is now limited to incidents where there is a high potential for violence and disorder growing beyond the capability of state and local police and the National Guard to control.

The only other "intelligence files" concerning civilians maintained by the Army consist of the files maintained by the Counterintelligence Analysis Division. The Assistant Chief of Staff for Intelligence of the Department of the Army is responsible for providing analyses of matters of concern to the Army. To perform this function, the Counterintelligence Analysis Division has been established in his office. This Division has a world-wide counterintelligence analysis function and is responsible for reviewing data for all Army areas of interest. The Division only develops civil disturbance information needed to answer specfic questions of concern to the Department of the Army. This office will, as a consequence, have limited filed concerning civilian activity. For example, the Division is responsible for identifying factors which affect civil disturbance potential so that Army officials can prepare civil disturbance plans. In the course of these analyses, information is received from the FBI and collated in order to permit evaluation. These files, along with the world-wide counterintelligence files are stored on microfilm because of the volume; they are not computerized, nor is there any plan to do so. In our view, the limited activities of the Counterintelligence Analysis Division constitute a proper activity of the Army in view of the mission requirements relating to civil disturbances imposed on the Army pursuant to law. The limited ques-

tions asked this Division in the civil disturbance field are ones of legitimate concern to the Army.

The Counterintelligence Analysis Division did compile an identification list from federal and local authorities on individuals and organizations associated with civil disturbances. This list was last updated in late 1969 and is available to a limited number of Department of Army organizations with civil disturbance responsibilities. The lists are now out of date, and are not considered necessary to satisfy the limited intelligence requirements referred to above. Accordingly, existing lists are being withdrawn from the field and destroyed, and new lists are not being prepared.

I trust that the information above will satisfy your concerns. I share your view that Army intelligence activities involving civilians must be strictly limited to matters essential to assigned Army missions, and I personally assure you that the Department of the Army will adhere to that principle.

Sincerely,

THADDEUS R. BEAL
Under Secretary of the
Army

AFFIDAVIT OF ROBERT E. JORDAN, III
GENERAL COUNSEL, DEPARTMENT OF THE ARMY

I, ROBERT E. JORDAN, III, being duly sworn, depose and state:

1. I am General Counsel of the Department of the Army. At all times relevant to this affidavit I have been serving either as Deputy General Counsel, Acting General Counsel, or General Counsel, Department of the Army. In July and August 1967 I was involved in planning activities to deal with potential civil disturbances in Washington, D.C. in my capacity as Deputy General Counsel, and since September 21, 1967, as Acting General Counsel and General Counsel, I have served as the principal Secretariat advisor to the Secretary and Under Secretary of the Army on civil disturbance matters, and that capacity have been directly and personally involved in Army civil disturbance planning, as well as in all operations involving the commitment of Federal troops to assist State or local authorities.

2. In July 1967, Federal troops were provided by President Johnson to assist authorities in Detroit, Michigan, pursuant to Chapter 15 of Title 10, U.S.C. Although Federal troops had been used in recent years in connection with desegregation problems and the enforcement of court orders, Federal troops had not been used to assist local authorities in dealing with widespread disorder in the nature of urban civil disturbance since 1943, when troops had been used in that capacity in Detroit. Accordingly, while the Department of the Army had general contingency plans for operations in support of local authorities to restore law and order, these plans were general in nature, and reflected the fact that there had been no occasion for such use of troops since 1943.

3. As a result of the disorder in Detroit in July 1967, the Army initiated a comprehensive review of civil disturbance plans, training and operations. The general review led to the development of a detailed family of contingency plans for operations in support of local authorities. The overall plan for such operations nationwide

was known as Garden Plot. The plan specifically tailored towards operations in the Washington metropolitan area known as Cabin Guard. A copy of the basic Cabin Guard plan is attached hereto. The revised plans were elaborations of more general plans which had been in existence for a number of years. Generally speaking, the revised plans involved a great deal more detail in terms of identifying a designating available forces, prescribing detailed training programs to be completed by troops with a potential civil disturbance assignment. In particular, they emphasized the necessity for careful and extensive coordination of all Government agencies affected by a civil disturbance at the Federal, State and local levels.

4. Planning for potential civil disturbances in the Washington, D.C. metropolitan area was given particular emphasis at the highest levels of Government. Before Federal troops had been withdrawn from Detroit as a result of the July 1967 disturbance there, a special Washington civil disturbance task force was created at the initiative of Secretary of Defense Robert McNamara. Members of the task force were as follows:

Members

Mr. David E. McGiffert, Under Secretary of the Army —Chairman

Mr. Stephen J. Pollak, White House

Mr. Walter N. Tobriner, D.C. Commissioner

Mr. Carl Belcher, Justice Department

Mr. Richard Fryklund, Deputy Assistant Secretary of Defense (Public Affairs)

Mr. Alfred B. Fitt, General Counsel, Army

Chief John B. Layton, Chief of Police, Washington, D.C.

Maj. General F. S. Greenlief, Deputy Chief, National Guard Bureau

Brig. General H. W. Hollis, Director Operations, Army

Col. George M. Bush, Secretary

Other Contributors

Lt. General Jonathan O. Seaman, 1st Army Commander, Ft. Meade
Maj. General Carl C. Turner, The Provost Marshal General, Army
Maj. General L. J. Fuller, Assistant Judge Advocate General, Army
Maj. General W. P. Wilson, Chief National Guard Bureau
Maj. General Howard W. Penney, Chief of Legislative Liaison, Army
Maj. General C. J. O'Malley, Commanding General, Military District of Washington
Mr. Rufus Youngblood, Secret Service
Mr. Edward I. Selig, Justice Dept.
Mr. Martin D. Richman, Justice Dept.
Mr. Robert E. Jordan, Deputy General Counsel, Army
Mr. Bland West, Office of General Counsel, Army
Colonel C. A. Peterson, 1st Army
Colonel C. Y. Talbott, 1st Army
Colonel C. B. Boswell, 1st Army
Mr. Henry Galotta, Fire Chief, D.C.
Lt. Colonel C. D. O'Connor, Plans & Programs, Office Assistant Secretary of Defense (Public Affairs)
Lt. Colonel Corcoran, Assistant Secretary of the General Staff

5. The task force held its first meeting on July 27, 1967, and held several additional meetings during the days which followed. These meetings were lengthy explorations of the areas to be covered by civil disturbance plans for the Washington metropolitan area. In addition, the planning meetings produced an assignment of tasks to be completed by participating individuals and agencies, with reports back to the task force on an accelerated schedule. The first finished product of this planning effort appeared on August 2, 1967 in the form of a summary of the results to date from the task force activities. That summary covered basic policies; available forces; the alert, assembly and commitment of forces; command and control (including relationships be-

tween military and civilian police authorities); the rules of engagement (those policies relating to the use for force by military and civilian personnel); communications equipment and supplies; fire protection, curfew, store closure and gasoline sale policy; provisions for arrests, arraignment and confinement; public and Congressional relations policy; and intelligence and incident reports. Subsequently, on August 24, 1967, a slightly revised and updated version of the planning summary was issued.

6. The policies outlined in the planning summary remained in effect through April 1968. During the period between August 1967 and April 1968, however, the participating agencies implemented the general plans and policies in considerable detail. There were numerous meetings between military officials, principally those of the Military District of Washington, and local police authorities. A special command post with pre-installed communications equipment was completed in the Municipal Building at 300 Indiana Avenue, Washington, D.C. the building which also is the headquarters of the Metropolitan Police Department. In addition, necessary preparations for a demonstration at the Pentagon on October 21-22, 1967, provided the occasion for most of the agencies which were involved in the July-August planning effort to jointly participate in planning and executing joint operations in connection with that demonstration.

7. In all of our planning for the use of Federal troops to support local authorities, a basic underlying policy was to assure that the commitment of Federal forces took place only where local authorities were unable to control a disorder. It was the view of the Secretary of Defense and the Secretary of the Army, a view which was also expressed by Justice Department representatives, (including then Deputy Attorney General Warren Christopher) that serious issues of Federal-State relationships were involved in the use of Federal troops to suppress disorder, and that there were dangers to our established political institutions in an excessive reliance on Federal forces, as opposed to those available to the Governor and local authorities, to deal with urban dis-

orders. Federal policies concerning providing Federal troops were set forth in a letter from Attorney General Clark to State Governors, dated August 7, 1967. Officials of the Justice Department and the Department of Defense recognized, however, that the special status of Washington, D.C. as a Federal enclave, coupled with the limited size of the District of Columbia National Gaurd, requires a less restrictive policy in the commitment of Federal troops in Washington, D.C. Nonetheless, it was still recognized that every effort should be made to contain disorders without resorting to the commitment of Federal troops.

8. On April 4, 1968, I was in my office at the Pentagon at approximately 7:30 p.m. when the Army Operations Center called to advise me that Dr. Martin Luther King. Jr., had been shot in Memphis, Tennessee. To my knowledge, the Operations Center also notified other Army civilian and military officials concerned with civil disturbance matters, and the Army Operations Center immediately began to monitor civil disturbance developments nationwide, including those in Memphis and in Washington, D.C. By 8:30 on the evening of April 4, a meeting had begun in the Army Operations Center under the chairmanship of Mr. David E. McGiffert, then Under Secretary of the Army, who had been designated by the Secretary of Defense and the Secretary of the Army as the civilian official directly and personally responsible for and in charge of civil disturbance matters. I also attended that meeting. Military officials present included Brigidier General Harris Hollis, Director of Operations for the Army, and his Deputy, Brigadier General John J. Hennessey. The Chief of Staff of the Army, General Harold K. Johnson, was in direct contact with the Army Operations Center from his office nearby.

9. During the evening of April 4, I remained in the Army Operations Center throughout until approximately 5:00 a.m. on the morning of April 5. During the evening and early morning Under Secretary McGiffert spoke by telephone to officials at the Department of Justice (principally Mr. Warren Christopher) and with District of Columbia officials (including Mayor Washington and

Director of Public Safety Murphy) and kept Mr. Paul Nitze, then Deputy Secretary of Defense, advised of developments. He also made periodic reports to the Secretary of the Army, Mr. Stanley R. Resor, who was kept advised throughout the disorders. Throughout the evening we received situation reports from the Metropolitan police concerning developments in Washington. Beginning at approximately 10:30 p.m. on April 4, the Chief of Staff of the Army, General Johnson, began directing certain actions to improve the alert and response time of Federal forces. Strike Command at MacDill Air Force Base, Florida, was asked to report on the availability of transport aircraft for troop movements. Two battalions located at Fort Bragg, North Carolina, were put on a six hour alert status. Military District of Washington officials were ordered to report to the command post in southwest Washington, near Fort McNair. A company of the 3d Infantry at Fort Myer was placed on alert for deployment on thirty minutes' notice. Subsequently, at about 12:15 a.m. on April 5, an additional company at Fort Myer was placed on alert, and the 2d Squadron of the 6th Armored Cavalry Regiment at Fort Meade was alerted, with one troop (approximately 150-180 men) ready to move in one hour. In addition, the Continental Army Command at Fort Monroe, Virginia, was increasing the alert posture of forces throughout the United States because of the situation nationwide as well as in Washington, D.C.

10. At approximately 2:00 a.m., April 5, I spoke to either Public Safety Director Murphy of Chief Layton —I cannot now recall which—concerning the situation in Washington. I was advised that the police judgment was that the disturbance was subsiding, and could be controlled during the early morning by the police force as it became fully mobilized. At Mr. McGiffert's direction, I scheduled a meeting to be held in the Army Operations Center at approximately 3:15 a.m. April 5. General Ralph Haines, then Vice Chief of Staff of the Army, was the senior military officer present. Public Safety Director Murphy attended as did General Southward, Commanding General of the D.C. National Guard, and Mr.

Thomas J. McTiernan, a Justice Department lawyer who represented the Attorney General. Brigadier Generals Hollis and Hennessey also attended. The meeting addressed the manner and various alternative legal bases for utilizing the National Guard of the District of Columbia. No final decision was made concerning alerting or calling the National Guard at that time. At the meeting we were concerned about what would happen at nightfall on April 5, which was considered to be the time when the police might need the assistance of the National Guard or Federal troops. Previous limited experience with urban civil disorder had indicated that the evening of the second day was the likely time for a resurgence of disorder. General Southward advised those attending the meeting that it would take approximately six hours to assemble the D.C. National Guard in the Armory. Based on this six hour assembly time, and on the potential need to have the Guard available on the evening of April 5, it was generally agreed that a decision concerning assembling the Guard in the Armory should be made in the vicinity of noon on April 5. The decision with respect to calling the Guard had to be made in advance of any decision on use of Federal troops, because the Guard, an organization composed of civilians who were scattered at locations throughout the Washington metropolitan area, had a substantially longer assembly and reaction time than did the Federal forces at locations such as Fort Myer, Virginia, and Fort Meade, Maryland. In addition, it was felt that if only moderate augmentation of the police were required, the availability of the Guard in the Armory would make it possible to assist the police without deploying Federal troops into the city.

11. During the morning of April 5, consultations between Army officials and those of the city and the Department of Justice continued. At 8:00 a.m. on April 5, the situation in the city appeared to be under control and relatively calm, according to the reports I received at that time.

12. Also on the morning of April 5, a meeting was scheduled for 11:00 a.m. with President Johnson at the

White House. I did not attend that meeting, but Under Secretary McGiffert did, and it is my understanding that Mayor Washington, Deputy Attorney General Christopher, and Director of Public Safety Murphy also attended. While the White House meeting was taking place, the Secretary of the Army and I were holding a meeting with military officials and the Commanding General of the D.C. National Guard in the Army Operations Center in the Pentagon. During our meeting, Secretary Resor consulted with Mr. McGiffert at the White House, and at approximately 12:30-12:45, before we had received any reports of renewed disturbances, it was agreed that the major elements of the District of Columbia Guard should be ordered to the D.C. Armory on a drill status. Secretary Resor immediately instructed General Southward to assemble the units in question as soon as possible. We thought at that time that assembling the units might be accomplished in as little as four hours.

13. Between 1:00 and 2:00 p.m. on April 5, I was in the Army Operations Center, and we began to receive reports of crowds assembling, with window breaking and looting, and some fires, in the upper 14th Street and 7th Street N.W. areas of the District of Columbia. At about 1:30 p.m., the Vice Chief of Staff, General Haines, ordered all units of the 3d Infantry at Fort Myer on a thirty minute alert immediately. As indicated earlier, prior to this time various units had been placed on increased alert. For instance, some units of the 6th Armored Cavalry Regiment, and the 3rd Infantry were prepared to begin moving toward their assembly areas in from 1½ hours to 2 hours. Other units were prepared to come under increased alert—thirty minutes to one hour—as of 6:00 p.m. that evening. At about 2:00 p.m. a meeting was held at the Pentagon chaired by Under Secretary McGiffert, and attended by Army Chief of Staff Johnson, Assistant Attorney General Vinson, and Metropolitan Police Chief Layton. I also attended the meeting. At approximately 2:45 p.m., we were advised than an Executive Order and Proclamation authorizing Federal troops had been delivered to the White House, and that Deputy Attorney General Christopher, General Haines

(who had been designated to command any Federal troops which might be required), and Public Safety Director Murphy were conducting a personal reconnaissance of the areas affected. About 3:00 p.m. General Hollis, who was in the Pentagon, was directed by General Haines to establish a military staff at the command post in the Metropolitan Police headquarters. At approximately 3:10 p.m., Under Secretary McGiffert initiated the order to move the 2d Squadron of the 6th Armored Cavalry Regiment from Fort Meade to Washington immediately, and the Army Chief of Staff, General Johnson, instructed the 91st Engineer Battalion from Fort Belvoir, Virginia, to move to its predetermined assembly area on the outskirts of Washington. These movements of troops were made in advance of a Presidential decision concerning the use of Federal troops on the streets, in order to shorten the response time in the event the Presidential decision to utilize Federal troops was made. We were advised at a few minutes past 4:00 p.m. on April 5 that the President had signed the Executive Order and Proclamation.

14. The first Army units arrived in the assembly areas in Washington approximately 4:30 p.m. on April 5, only one-half hour after the Executive Order was signed. Troops were deployed on the streets less than an hour later, and by 7:15 p.m. over 1600 troops were deployed on the streets. By about 10:30 p.m. that evening, about 6,000 troops had been committed to civil disturbance control operations in the District of Columbia. In several cases, troop units arrived at their assembly areas in the District in less than the estimated reaction time which was incorporated in Army plans. For example, the 2d Squadron, 6th Armored Cavalry, from Fort Meade, Maryland, reached its assembly point in the District in an hour and twenty minutes compared to a previously estimated reaction time of two and one-half hours. Similarly, the 91st Engineer Battalion from Fort Belvoir, Virginia, reached its assembly point in one and a half hours, against an estimated time of two and one-half hours. However, when troops began to leave their assembly areas to take up their assigned posts of duty

on the city streets, they were hindered by heavy traffic caused by the mass exodus of persons leaving the Washington downtown business area prior to normal closing hours as a result of conditions in the city. The same conditions also delayed the assembly of the District of Columbia National Guard.

15. In making decisions concerning the employment of Federal troops, a number of complex and inter-related policy considerations had to be assessed by those responsible for the decisions. From my participation in the discussions preliminary to these decisions, I know that some of the policy considerations were as follows:

(a) With respect to the use of active Armed Forces, as distinguished from the District of Columbia National Guard, I have already referred to the general policy of attempting to limit the use of active Armed Force for domestic law enforcement purposes because of concern over the intrusion of military forces into the civilian sphere.

(b) The alerting of active forces for potential use in civil disturbance operations cannot be undertaken independent of considerations relating to the role of the same troops in possible international operations. For example, at the time of the April disorders, a major effort was under way in the Army to improve the training readiness of the Army forces located in the continental United States. These forces, most of which are known as the Strategic Army Force (STRAF), are the principal forces available to the President in the event of a major or minor international contingency. Accordingly, their readiness to conduct operations pursuant to contingency plans in the international arena is of continuing concern to the Department of Defense. When any unit is placed on an alert posture which requires it to be ready to depart its home station within a few hours, normal training necessarily ceases as troops are unable to conduct field training, and must prepare themselves and their equipment for departure on short notice. Since there will be many more situations in which there is a potential for the use of active forces than situations in which they are actually employed, military officials must exer-

cise care that troop units are not placed on alert too frequently, or for excessive periods of time.

(c) An additional detrimental effect of short alert times is their impact on the physical and mental well being of the troops involved. When troops are placed on short alert, virtually all activities outside their immediate unit arch must be curtailed. With very short alert times in the one-two hour range, it may not even be opssible for personnel involved to sleep. The continuation of alerts for a long period of time can seriously degrade the effectiveness of the personnel in the units if they are later actually employed in civil disturbance operations.

(d) A complicating factor in the disorders in April 1968 was reports of disturbances in a large number of American cities substantially simultaneously. For example, there were serious disorders in Memphis, Chicago, Detroit, Baltimore, Pittsburgh, and other cities as well as in Washington, D.C., and subsequently the National Guard was employed in a state active duty role in approximately 23 cities. It was extremely difficult to project the course of events in many of these cities during the earlier periods of the disturbances. Accordingly, Department of Defense officials had to exercise care that the premature deployment of troops to a particular city might not preclude operations in another city where conditions might prove to be even more severe. In addition, maintenance of units to meet a potential international contingency had to be considered.

(e) Another major factor which had to be considered was the availability of airlift resources. In order to arrive without delay in the cities experiencing disorders, active forces committed to civil disturbance operations which were located any significant distance from the destination city must be transported by air. This transportation is provided, in the first instance, by Air Force aircraft equipped for troop carrier and cargo duty. Now, as then, the same aircraft, however, are constantly involved in transporting material to Vietnam and on other missions relating to the national defense. When troop units are placed on a short alert time, it is also necessary to divert aircraft from Vietnam missions and other missions and preposition them at or near the departure

station for the units. While so prepositioned, the aircraft are essentially useless for other operations. The factor had to be carefully weighed in making decisions concerning alert and deployment of forces.

(f) Even if aircraft are diverted and prepositioned, personnel fatigue with respect to air crews has an impact on alert time. For short alert times, air crews must be at or near their aircraft, an alert posture which cannot be maintained for extended periods of time because of safety factors relating to exhaustion of the crews. Under Air Force regulations designed to insure safety, once air crews have been on alert for a specified period of time, they had to be released from alert and given a rest period of a number of hours. Since duplicate crews were not always available, officials in the Department of Defense have to constantly consider the problem of air-crew exhaustion in determining whether to increase the alert posture of the transport aircraft.

16. After the initial military forces were committed to the control of the civil disturbance in Washington, D.C. on April 5, I was involved in the planning and events which led to the re-enforcement of the military forces in the Washington, D.C. area as well as the employment of Federal forces in Baltimore, Maryland, and Chicago, Illinois. During this period, the Army Operations Center was kept fully informed by General Haines of the efforts to control the civil disturbance in Washington, D.C. Under Secretary of the Army McGiffert remained in or in close contact with the Army Operations Center during the ensuing period until Federal troops were withdrawn from Washington, D.C. The Secretary of the Army and other Department of Defense officials were kept informed of developments in the city during the period when employment of military forces in Washington, D.C. succeeded in bringing the disturbance under control. From my observations of the events of the period, including personal reconnaisance of the civil disturbance area in Washington, D.C. on a number of occasions, it is clear to me that Federal troops did an outstanding job in meeting the very difficult and demanding task of controlling the disorder. They did this with

the minimum use of force consistent with the accomplishment of their mission to help the local civilian authorities to re-establish and maintain law and order in Washington, D.C. Of particular note is the marked contrast in the use of firearms by soldiers in Washington, D.C. as compared with the summer 1967 examples documented by the National Advisory Commission on Civil Disorders. This reflected the Department of Defense policy of strictly limiting the use of deadly force during a civil disorder with reliance placed instead on saturating an area with manpower and using CS (tear gas). It is clear to me that the outstanding accomplishments of the troops were directly related to the quality of the planning and the training programs initiated after the 1967 Detroit disturbances.

/s/ Robert E. Jordan, III
General Counsel

AFFIDAVIT OF ROBERT E. JORDAN III
GENERAL COUNSEL OF THE ARMY

I, ROBERT E. JORDAN, being duly sworn, depose and state:

1. I am General Counsel for the Department of the Army. At all times relevant to this affidavit, that is, since the Summer of 1967, I have been serving either as Deputy General Counsel, Acting General Counsel; or General Counsel of the Department of the Army. In those capacities I have served as the principal Secretariat Advisor to the Secretary and Undersecretary of the Army on civil disturbance matters and have been directly and personally involved in Army Civil Disturbance Planning, as well as in all operation involving the commitment of Federal troops to assist state or local authorities.

2. Under the plan by which the Departments of Defense and Justice (1) coordinate their preparations for their responses to any serious civil disturbances that may hereafter occur in a city in the United States and (2) to assist the President in responding appropriately and effectively to any request he may receive for Federal military troops to aide in suppressing such a disturbance or to enforce Federal law under 10 U.S.C. 3332 or to protect civil rights pursuant to 10 U.S.C. 3333, the Attorney General has been designated by the President as the Chief Civilian Officer in charge of coordinating all Federal Government activities relating to civil disturbances. The Attorney General is so designated because of his responsibilities as Chief Law Enforcement Officer of the Federal Government, and as Chief Legal Advisor to the President on the critically important decisions the President must personally make as to whether and when to permit military forces in response to an appropriate state request.

On the other hand, all essentially military preparations and operations, including especially the employment of military forces at the scene of a disturbance, is the primary responsibility of the Secretary of Defense. In discharging these function, he observes such law enforcement policies as the Attorney General may determine. To

the extent practical, such law enforcement policies are formulated during the planning stage so that military commanders can familiarize themselves with them and train their personnel to implement them. This assures that military planning and operations are consistent with Administration policy and the requirements of law.

The responsibilities of the Department of Defense under this plan are carried out principally through the Department of the Army, inasmuch as the Secretary of the Army is assigned primary responsibility for civil disturbance matters, as Executive Agent, subject to the general supervision of the Secretary of Defense. Within the Department of the Army, a Directorate for Civil Disturbance Planning and Operations serves the Secretary and the Army Chief of Staff as the principal military staff agency for such matters.

The Secretary of Defense has the primary responsibility for training, equipping, and designating the forces to be used in controlling civil disturbances. He also retains primary responsibility for preparing operation plans, determining procedures for alerting and moving the forces, and testing command and control arrangements. The Attorney General is consulted on important questions of law and law enforcement policy arising in connection with these plans and preparations.

When a State Governor anticipates that a request for Federal military assistance will shortly become necessary, he will confer with the Attorney General concerning the facts of the situation, so that the Attorney General can review the legal sufficiency of the impending request. After consultation with Department of Defense officials on the gravity of the situation, the Attorney General will advise the President whether the conditions would warrant honoring a request at that particular time.

When the Governor concludes that a formal request for military assistance is necessary, he will address it directly to the President. At such time, the President must exercise his personal judgment as to whether or not to commit Federal armed forces. The decision may be a difficult one, as it involves a weighing of the apparent need for Federal forces in the circumstances, and the

President's responsibility to respond to State requests for such assistance, against the primary responsibility of State and local authorities for maintaining local law and order, and the inadvisability of employing Federal military force for that purpose except in the last resort.

The Attorney General will have furnished the President with an appropriately drawn Proclamation and Executive Order, to be signed by the President in the event that he decides to honor the request. These documents will formalize the decision and state the factual and legal grounds on which it is based.

ROBERT E. JORDAN III
General Counsel of the
Army

AFFIDAVIT OF WARREN CHRISTOPHER

I, WARREN CHRISTOPHER, being first duly sworn, depose and state:

1. I am a partner in the law firm of O'Melveny & Myers located at 611 West Sixth Street, Los Angeles, California. From July 24, 1967 until January 20, 1969, I was the Deputy Attorney General of the United States with my office in the Department of Justice in Washington, D.C. In my capacity as Deputy Attorney General I was the second ranking official of the Department of Justice, responsible directly to the Attorney General, who at that time was Mr. Ramsey Clark.

2. I am making this affidavit based upon my personal knowledge of the events described below and my participation therein, as well as upon the official records and reports prepared by me, or at my request, or received by me as part of my official duties with the Department of Justice.

3. In my role as Deputy Attorney General following the riots in Detroit in July of 1967, I participated in the drafting of a letter from the Attorney General to the Governors of all the States dated August 7, 1967 which set forth the legal requirements and policies with respect to the use of federal troops to control civil disturbances. A copy of this letter is annexed hereto as Attachment 1 to this affidavit.

4. On April 4, 1968 shortly after 7:00 p.m. (EST), I was attending a regular weekly staff conference in the office of Attorney General Clark when we were notified by the Army Operations Center that Dr. Martin Luther King, Jr. had been shot in Memphis, Tennessee.

5. The Department of Justice had established an Information Unit on the Sixth Floor of the Justice Department building in February of 1968 primarily to collect immediate information about civil disturbances throughout the country. The information was received from a variety of sources including the FBI, Department of Army Operations Center, wire services, police departments and officials of various governmental agencies throughout the United States.

6. We received reports throughout the evening of April 4 relating to disorders in cities across the nation.

The first indication of a serious disturbance came at about 9:00 p.m. when we were advised that rioting was occurring in Memphis, Tennessee, and that the Governor of Tennessee had committed National Guard troops to that city.

7. Shortly thereafter, we began receiving reports from the Washington Metropolitan Police Department concerning the situation in Washington, D.C. The first reports indicated that large crowds were congregating in the vicinity of Dr. King's Washington, D.C. headquarters at 14th and U Streets, N.W., but that the mood of the crowd was one of shock and dismay rather than of violence. Shortly thereafter, we were advised that Stokely Carmichael was leading a crowd to various stores along 14th Street asking proprietors to close their businesses out of respect for Dr. King and that the store owners were complying with these demands.

8. President Johnson had appeared on national television shortly after 9:00 p.m. to announce the death of Dr. King to the nation and in a brief speech called on all citizens to reject violence. Because of the crisis by the assassination of Dr. King, President Johnson postponed a trip to Hawaii scheduled to commence the following day.

9. Commencing around 9:30 p.m. or shortly thereafter, we received the first reports that the mood of the crowd on 14th Street, N.W. was changing to one of violence. We were advised that store windows had been broken and looting and vandalism had occurred. We were further advised that police patrols were heavily outnumbered and that the police were attempting to seal off the areas of disorder in order to keep innocent passers-by out of the area of danger and to prevent the disorder from spreading.

10. As police civil disturbance forces arrived we were informed that an effort was made to close 14th Street from U Street north, but that the police were having difficulty in accomplishing this action because of the large crowd on the street. We were further advised that police and fire department forces were being subjected to verbal abuse and were the targets of missiles thrown at them.

11. At 10:20 p.m. Deputy Chief Hughes of the Metropolitan Police Department advised Assistant Attorney General Stephen Pollak of the Civil Rights Division and Assistant Attorney General Fred M. Vinson, Jr. of the Criminal Division that he was hopeful the trouble was subsiding. However, he said that he planned to hold the 4:00 p.m. to midnight shift on duty, and would have more manpower in half an hour as a result of having called the midnight shift of the police in early.

12. Between 9:00 p.m. and midnight we also received information of civil disorders in a number of other cities around the nation, including Nashville, Tennessee; Chicago; New York City; Raleigh, North Carolina; and New Haven, Connecticut.

13. In the early hours of April 5, I was advised that the looting and burning in Washington, D.C. had almost ceased and the city was relatively calm and under control. At my request Mr. Thomas J. McTiernan of the Department of Justice represented the Department at a meeting held in the Army Operations Center at the Pentagon at approximately 3:15 a.m. on April 5, 1968. The purpose of the meeting at the Pentagon was to evaluate the likelihood of further disorder on the following day. At that time the Department of Justice Information Unit was continuing to receive reports relating to disorders in other cities throughout the United States.

14. Between 4:00 and 5:00 a.m. Ramsey Clark left for Memphis to direct the FBI in its search for the assassin of Dr. King. Upon Attorney General Clark's departure from Washington, I was left in charge of the Department of Justice.

15. Commencing at 9:20 a.m. on April 5, I discussed with Mr. David E. McGiffert, the Under Secretary of the Army, alternative legal bases for calling the National Guard and federal troops into action in Washington if such troops were needed. Starting at 10:15 a.m. I spoke with Mr. Julian Dugas of the District of Columbia Government regarding the possible mobilization of the District of Columbia National Guard.

16. At 11:00 a.m. on April 5, I attended a meeting at the White House which President Johnson had called to

discuss means of avoiding further violence in the nation in general, and in particular racial violence occurring as an aftermath of Dr. King's assassination. This meeting with civil rights leaders was also attended by Mayor Walter E. Washington and Director of Public Safety Patrick Murphy of the District of Columbia, and Mr. David E. McGiffert, Under Secretary of the Army. Others in attendance included Congressional leaders of both parties, Cabinet officers and a number of prominent Negroes throughout the nation, including Robert C. Weaver, Thurgood Marshall, Bayard Rustin, Clarence Mitchell, Jr., Judge A. Leon Higgenbotham, Jr., Mayor Richard G. Hatcher of Gary, Indiana, Mrs. Dorothy I. Height, Reverend Leon Sullivan, Bishop George W. Baber, Whitney M. Young, Jr., Roy Wilkins, Clarence Mitchell III, and Reverend Walter E. Fauntroy.

17. At noon I met with Mr. McGiffert, Mr. Murphy, and Mr. Larry Temple, Special Counsel to the President, at the White House to discuss the general availability of troops and the possible need for additional federal assistance in Washington. Director Murphy stated that 1,000 police were on duty in Washington. At approximately 12:20 p.m., we agreed to recommend that the District of Columbia National Guard should be called to the D.C. Armory and put in a training status. At the conclusion of this meeting Mr. McGiffert and Director Murphy left the White House to go to the Pentagon. At about the same time Fred M. Vinson, Jr. represented the Department of Justice at a meeting in the Army Operations Center. At that meeting it was determined that the D.C. National Guard would be assembled in a drill status by Friday evening.

18. At 1:35 p.m. I advised Mr. McGiffert that we had received reports of new disturbances in Washington. At approximately 2:00 p.m. I received a telephone call from the White House directing me to make a personal investigation of the disturbance area to determine whether federal troops were required.

19. At 2:05 p.m. I asked Army Chief of Staff Harold K. Johnson to designate a Senior General Officer to report to the White House and accompany me on an in-

spection tour of the disturbance area in Washington to evaluate the need for federal troops. General Johnson advised me that General Ralph E. Haines, Jr., Vice Chief of Staff of the United States Army, would be commander of Task Force Washington if it were activated, and designated General Haines to accompany me.

20. A meeting was also scheduled at the Pentagon for 2:00 p.m. Fred Vinson represented the Department of Justice. This meeting was also attended by Mr. McGiffert, General Johnson, and Chief [redacted] the Washington Metropolitan Police Department John Layton. Mayor Washington was at that time in the White House discussing conditions in the city as they were reported by Deputy Mayor Thomas Fletcher.

21. At about 2:30 p.m., prior to leaving the White House on the inspection tour of the city, I had delivered to the White House a Presidential Proclamation and Executive Order authorizing the use of federal troops in Washington should the President decide to take such action.

22. As soon as General Haines arrived at the White House, he, Patrick Murphy and I left on the inspection tour of the disturbance areas of the city at about 2:45 p.m. We were travelling in Mr. Murphy's car. We found the streets crowded and we observed extensive looting and fires on 7th Street and 14th Street. Because of the rioting and the mass exodus of people employed in the downtown area the streets were jammed with traffic and our vehicle's progress was slow.

23. Mr. Murphy's car had a police radio but we were reluctant to communicate with the President or other high officials on this radio since the conversation could be overheard by the public. During the course of the trip, at about 3:00 p.m., we phoned the White House and left word how we could be reached by radio in the car. At about 3:45 p.m., when it appeared to all of us that federal troops were needed, I stopped at a phone booth to telephone the President. Because some of the available telephones were riot damaged and the telephone circuits were overloaded, we were delayed 10 to 15 minutes in completing the call. Shortly before 4:00 p.m. I reached the

President and advised him that General Haines, Director Murphy and I all recommended that federal troops be brought into the city as soon as possible. The President advised me then that he was signing the Executive Order and Proclamation authorizing the use of federal troops.

24. Previously, at about 3:30 p.m., General Haines had radioed to the Pentagon and asked that the troops be started moving from Fort Meade to Washington, and immediately after my discussion with the President, General Haines called General Johnson to make arrangements for activation and deployment of federal troops.

25. After making the telephone calls to the President and to the Chief of Staff, General Haines and I went to Metropolitan Police headquarters where General Haines assumed duty as Commander of Task Force Washington. I then telephoned Mr. Joseph Califano, Special Assistant to the President, at the White House to advise him of the current situation. I also phoned the Department of Justice and talked to the duty officer and advised as to the present situation.

26. I remained at police headquarters until the arrival of Cyrus Vance at about 5:30 p.m. I briefed him with respect to the present status of civil disturbances in Washington, D.C. I then returned to the Department of Justice. Attorney General Ramsey Clark returned to Washington from Memphis at about 8:00 p.m. Friday evening and again assumed charge of the Justice Department.

27. The following day, April 6, we continued to receive reports on the civil disturbances in Washington, D.C. as well as around the nation. In the evening of April 6 the White House requested that I leave for Chicago to determine whether the situation there required the presence of federal troops, and I left for Chicago by plane at about 7:30 p.m.

28. I returned to Washington, D.C. on April 8, and by that time the disorders in Washington were substantially over.

WARREN CHRISTOPHER

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530
(Letterhead)

Dear Governor:

At the President's request, I am writing you regarding the legal requirements for the use of Federal troops in case of severe domestic violence within your state. The requirements are simple. They arise from the Constitution. So the principles will be clearly in mind, I will briefly outline here the basic considerations of Federal law applicable to such a situation.

The underlying constitutional authority is the duty of the United States under Article IV, Sec. 4, to protect each of the states "on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence." This pledge is implemented by Chapter 15 of Title 10, U.S.C. and particularly 10 U.S.C. 331, which derives from an act of Congress passed in 1792. The history of the use of Federal forces at the request of governors in varied circumstances of local violence over more than a century is also instructive.

There are three basic prerequisited to the use of Federal troops in a state in the event of domestic violence:

(1) That a situation of series "domestic violence" exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is no prescribed wording.

(2) That such violence cannot be brought under control by the law enforcement resources available to the governor, including local and State police forces and the National Guard. The judgment required here is that there is a definite need for the assistance of Federal troops, taking into account the remaining time needed to move them into action at the scene of violence.

(3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. The element of request by the governor of a State is essential if the legislature cannot be

convened. It may be difficult in the context of urban rioting, such as we have seen this summer, to convene the legislature.

These three elements should be expressed in a written communication to the President, which of course may be a telegram, to support his issuance of a proclamation under 10 U.S.C. 334 and commitment of troops to action. In case of extreme emergency, receipt of a written request will not be a prerequisite to Presidential action. However, since it takes several hours to alert and move Federal troops, the few minutes needed to write and dispatch a telegram are not likely to cause any delay.

Upon receiving the request from a governor, the President, under the terms of the statute and the historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federalization of the National Guard.

Preliminary steps, such as altering the troops, can be taken by the Federal government upon oral communications and prior to the governor's determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the federal forces will be needed.

While the formal request must be addressed to the President, all preliminary communications should be with me. When advised by you that serious domestic violence is occurring, I will inform the President and alert the proper military authorities. You can reach me at my office, my home, or through the White House switchboard at any hour.

Enclosed are copies of the relevant constitutional and statutory provisions and a brief summary of past occasions on which a governor has requested Federal military assistance. Your legal counsel, I am sure, keeps you fully advised of requirements of state law as well.

If you have any questions or comments, please let me know.

Sincerely,

Attorney General

Enclosures

THE CONSTITUTION

Article IV, Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence.

TITLE 10, UNITED STATES CODE

Chapter 15

§ 331. Federal aid for State governments.

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be conveined, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

* * * *

§ 334. Proclamation to disperse.

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

STATE REQUESTS FOR FEDERAL ASSISTANCE IN SUPPRESSING DOMESTIC VIOLENCE

A. Chronological List

1838—Buckshot War. The Pennsylvania Governor asked for Federal assistance (based on Const. Art. IV, sec 4) in restoring order when violence resulted from a bitter political contest. President Van Buren refused on the ground that Federal interference is justified only where domestic violence in such that State authorities have proved inadequate.

1842—Door Rebellion. Rhode Island Governor King asked for assistance to stop the attempt of Dorr to claim the Governorship. President Tyler replied that the time for Federal interference had not arrived since there was no actual insurrection. Further requests were denied on the ground that the legislature was in session and the Governor therefore was not authorized to apply for aid. The President said he would issue a proclamation if a lawful request was made, but Dorr disbursed his troops and this was not done.

1856—San Francisco Vigilance Committee. California Governor requested Federal aid in stopping the Committee from usurping the authority of the State. The Attorney General advised President Pierce that the circumstances did not afford sufficient legal justification for Federal assistance since there was no "actual shock of arms" between insurgents and the State, and the State had not exhausted its powers to deal with the situation. (8 Op. A.G. 8) The President took no action.

1873—New Orleans unrest. Lawlessness due to racial problems and also political uncertainty as to proper occupants of political office resulted in violence. Louisiana Governor asked for Federal help. President Grant issued a proclamation ordering the insurgents to disperse. Failure to heed the proclamation and increased disturbance resulted in a further proclamation and dispatch of two regiments.

1876—South Carolina riots. Riots resulted from an altercation between the Ku Klux Klan and Negro state militia. The President issued a proclamation in response to a call for Federal intervention and troops were stationed at 70 places in the State to secure the peace during the election. (This action culminated in enactment of Posse Comitatus Act of 1878).

1877—Railroad Strike riots. Upon request for Federal intervention, President Hayes issued proclamations with respect to West Virginia, Maryland, Pennsylvania and Illinois to restore order. The Ohio Governor asked for and received Federal arms but did not request troops. Indiana asked the President to authorize the commandant at the U.S. arsenal to aid the state. On the ground that the request was incorrectly made, the Governor was informed that Federal troops would be used only to protect U.S. property. Michigan, Wisconsin and California also made requests for help but the situation in those states did not become critical.

1892—Idaho's Coeur d'Alene mining disturbances. During a seven year period, President Harrison, Cleveland and McKinley furnished Federal assistance which was requested by Idaho Governors.

1894—Coxey's Army of unemployed. President Cleveland instructed the army to assist Montana in handling violence of a Coxeyite contingent in Montana, at the Governor's request. However, the President did not issue a formal proclamation.

1903—Colorado mining strike disturbance. President Theodore Roosevelt denied assistance to the Colorado Governor who made two requests for "such aid as I may call for", but promised that the Federal Government would act when a request was made in a manner "contemplated by law", explaining that under H.R. 5297 there must be shown an insurrection against the State and inability of the State to control it.

1907—Nevada mining disturbance. In response to an urgent request from the Governor, President Roosevelt

ordered troops to assist. Later, a President's investigating committee found there was no warrant for the assertion that the civil authority of the state had collapsed. After the President threatened withdrawal of the troops, the Governor convened the legislature, which asked that Federal troops remain for a short period until the State Police could be organized and equipped to handle the situation.

1914—Colorado coal strike. At the request of the Governor, President Wilson sent troops to stop rioting, but only after considerable negotiation and exploring of avenues of peaceful resolution by Government representatives failed.

1919—Race riots in Washington, D.C. and Omaha; Gary steel strike. On the theory that the service by the National Guard in the war left the States without adequate protection against internal disorders, the Secretary of War instructed commanders to the departments to respond to state requests for assistance. The use of Federal troops in 1919 was without a proclamation or other formalities.

1921—West Virginia coal mine warfare. President Harding was requested by the Governor to intervene. The President stated that he was not justified in using Federal military forces until he was assured the State had exhausted all its resources. A subsequent outburst of violence resulted in a Proclamation and order to dispatch Federal troops. The troops met no resistance and disarmed the miners.

1932—The Bonus Army. Needy veterans who came to Washington to seek veterans' bonus legislation were housed in tents, shacks, and government buildings which were being demolished. The Treasury Department attempted to repossess a government building in order to continue demolition, resulting in a clash between the veterans and police. The District Commissioners asked the President for assistance and the army moved in, cleared the buildings and destroyed the shacks. No proclamation was issued.

1943—Detroit race riots. The Governor advised that the State was unable to suppress domestic violence, the President issued a proclamation and Federal troops were dispatched.

1967—Detroit riots. The most recent incident, of course, was the dispatch of Federal troops to Detroit on July 24, 1967 at the request of the Governor. President Johnson issued a proclamation and Executive Order pursuant to Chapter 15 of Title 10, U.S. Code.

AFFIDAVIT OF FRED M. VINSON, JR.

I, Fred M. Vinson, Jr., being first duly sworn, depose and state:

1. I am an attorney and a partner in the law firm of Reasoner, Davis & Vinson with offices at 800 Seventeenth Street, N.W. in Washington, D.C. From April 1965 until January 1969, I was the Assistant Attorney General in charge of the Criminal Division of the Department of Justice.

2. One of my responsibilities at the Department of Justice was to participate in establishing an Information Unit within the Department of Justice. The Information Unit had direct line telephones to the Metropolitan Police Department in Washington, D.C., the Army Operations Center, the Secret Service, the United States Attorney's office, the Park Police, the Capitol Police and the General Service Administration. It also received written and oral reports from the FBI, from Army Intelligence, from the D.C. Metropolitan Police Force and police departments throughout the United States as well as from the national wire services and local radio stations. The Information Unit was closed in the fall of 1967 but was re-established in early 1968. The Information Unit had first been organized in 1967 and was established primarily to collect information about civil disturbances throughout the country as quickly as possible.

3. On January 11, 1968, Attorney General Ramsey Clark sent me a short memorandum asking me to establish a "Law Enforcement Task Force" for the District of Columbia, with representation from the Metropolitan Police Department, the Capitol Police, the Park Police, General Services Administration, Department of Defense, and "such other law enforcement agencies as may be necessary." The Attorney General stated that the Task Force was "to have the responsibility, on a permanent basis, of anticipating law enforcement problems in the District of Columbia of a civil disobedience, massive demonstration, or riot potential nature, which will require multiple agency handling." He further asked that each agency designate a permanent representative who would

be responsible for initiating information interchange and coordination whenever the need arose.

4. I then intiated steps to set up a Task Force on Law Enforcement in the District of Columbia: I was Chairman of the Task Force and other members included Major General Charles L. Southward, Commanding General of the D.C. National Guard; Chief Walter W. Lange of the U.S. Park Police; Captain Roy Hill of the White House Police; Mr. Jack Parker of the U.S. Secret Service; Chief John B. Layton of the Metropolitan Police Department; Patrick V. Murphy, Director of Public Safety of the District of Columbia; Brigadier General John J. Hennessey, Deputy Chief of Staff for Operations for the Department of the Army; Chief James M. Powell of the U.S. Capitol Police; Mr. Louis V. Milici, Chief, Protection Division of the General Services Administration; David G. Bress, U.S. Attorney for the District of Columbia; and James McShane, Head, Executive Office for U.S. Marshals, U.S. Department of Justice.

5. In addition to the Task Force, I established a "working Group" under the direction of Thomas J. McTiernan of the Criminal Division. This Group included representatives of the agencies included on the Task Force and other interested personnel. The purpose of the Working Group was to provide staff support in the form of working drafts and recommendations for the use of the Task Force.

6. At about this same time, in early 1968, I instructed a group of attorneys in the Criminal Division to prepare a compendium of federal and local laws relevant to civil disturbances in the District of Columbia. Such a compendium was prepared on March 22, 1968 and was distributed to all agencies represented on the Task Force.

7. On March 22, 1968, the Working Group presented its "proposed plan of operation for law enforcement in the event of a major civil demonstration or disorder in the District of Columbia." This plan presented detailed recommendations for mass arrest and detention procedures in the case of a civil disturbance or civil disobedience in the District of Columbia and set forth proposed plans of communications and intelligence, protection of key in-

stallations, arrest policy and procedure, as well as the names and home and office phone numbers of key personnel in each agency. The objective of the plan of operation was "to effect coordination between interested departments and agencies of the Federal Government and the District of Columbia in the critical areas of planning, communications, lines of authority and divisions of responsibilities in maintaining law enforcement in the event of a major civil demonstration or disorder in the District of Columbia."

8. The provisions of the plan as they had been established at that time were summarized as follows:

> Each interested department or agency will establish a command post to be activated in the event of a major civil demonstration or disorder. Key personnel in each department or agency will be designated to be responsible for coordinating law enforcement activities consistent with this plan of operation. During major demonstrations the Department of Justice command post will serve as the center of operations for law enforcement activities. Direct line telephone communications between the Department of Justice command post and other command posts will be established. Existing communications systems between interested departments and agencies also will be used. Key public buildings and public utility installations will be protected. In arrest cases the Metropolitan Police Department will transport and process those arrested. All arrests arising from major demonstrations or disorders will be processed at central cell block and, if necessary, the District Court detention facility. When mass arrests occur or are anticipated, the Metropolitan Police Department will alert the United States Attorney and the Corporation Counsel. Thereafter, the courts and prosecutors will staff according to the needs of the situation. Defense counsel will be available at the central processing detention facility. Central disposition records will be maintained for arrested individuals by the Metropolitan Police Department.

9. On March 29, 1968, a meeting of the Task Force was held in my office to discuss the draft plan developed by the Working Group. At this meeting, there were discussions of some details and of means of effectuating the general recommendations of the working group. On April 2, representatives of the Working Group met with representatives of the District of Columbia Department of Corrections and the Federal Bureau of Prisons to finalize contingent detention plans, including the use of the Occoquan facility staffed by federal personnel in the event of large-scale arrests during a civil disturbance.

10. In addition to working with the Task Force, I also conferred on a number of occasions with David E. McGiffert, then Under Secretary of the Army, who was in charge of another Washington Civil Disturbance Task Force, which had prepared a plan for civil disturbances in the metropolitan Washington area principally directed to the use of federal troops and their relationship with civil authorities. The Task Force headed by Mr. McGiffert also included representatives of the White House, Defense Department, Army, National Guard Bureau, Metropolitan Police, the Criminal Division of the Justice Department, and the District Government.

11. On April 4, 1968 at about 7:30 p.m., I was attending a staff conference in the office of Attorney General Ramsey Clark when we received notification from the Army Operations Center that Dr. Martin Luther King, Jr. had been shot. While there had been some reports of minor disturbances coming into the Information Unit, there had been no word of any serious civil disturbance locally until about 9:30 p.m. I was preparing to go home at that time, when word was received of disorders in the area of Fourteenth Street, N.W. in Washington, D.C. I then remained at the Department to follow developments along with other officials of the Department of Justice.

12. At about 10:20 p.m., Deputy Chief Hughes of the Metropolitan Police Department telephoned to advise that the trouble was subsiding and it appeared to be under control at the moment. However, he advised me that in any event he planned to hold the 4:00 p.m. to midnight

shift on duty, and was calling in the midnight shift an hour early.

13. There was, as is usually true, a serious problem of determining the severity of a disturbance while it is going on, based on the reports received from the various reporting agencies. The reports come from a number of different sources and from different perspectives. The same incident may be described by different people in different ways and occasionally it is difficult to determine whether they are describing the same incident or a series of incidents. Further, reports are frequently received in the wrong time sequence making it difficult to establish a chronology.

14. Attorney General Clark, Deputy Attorney General Warren Christopher and other officials of the Department of Justice remained at the Department throughout the night of April 4-5, 1968. At 3:15 a.m. Thomas J. McTiernan represented the Department of Justice at a meeting held in the Army Operations Center in the Pentagon, to consider the possibility of further disorders on the following day and whether the National Guard should be called out in anticipation of such disorders. At between 4:00 and 5:00 a.m., Attorney General Clark went to Memphis, Tennessee, the scene of the assassination.

15. On the morning of Friday, April 5, I participated in conferences with other Department of Justice officials, including Deputy Attorney General Warren Christopher concerning available police manpower, review of established procedures to meet legal requirements for the use of troops and National Guardsmen, court procedures and other matters included within the Task Force report. I also conferred with officials of the District of Columbia Government, the United States Attorney, the Metropolitan Police and other agencies represented on the Task Force in connection with the arrest and detention plans in case of renewed disturbances in the District of Columbia.

16. I attended a conference shortly after noon on April 5 at the Army Operations Center in the Pentagon. Also attending the conference were Secretary of the Army Stanley R. Resor, Chief of Police, John B. Layton of the

Metrooplitan Police, Major General Southward of the D.C. National Guard, and Major General Charles S. O'Malley, Jr., Commanding General of the Military District of Washington. This meeting was called primarily to discuss and determine the drill status of the District of Columbia National Guard and the alert status of federal troops. Decisions were made to assemble the Guard and advance the alert status of federal troops.

17. That afternoon I returned to the Department of Justice and continued to follow reports from the District of Columbia and around the nation. As the disorders spread in the District of Columbia, and as the number of arrests mounted, it quickly became apparent that the detention facilities and customary booking procedures would be overtaxed. As a result, central booking was instituted to supplement precinct booking, and it was determined that some of those arrested on charges of curfew violations and other violations of a less serious nature would be detained at the Occoquan Detention Center.

18. On Saturday, April 6, the severity of the disorders in Washington had decreased, but the reports showed increasing disorders in Baltimore, Chicago and other cities. Warren Christopher had gone to Chicago on the evening of April 6th as the federal representative to recommend whether troops were needed in that city. In the afternoon of April 7th, I was requested by the Attorney General to proceed to Baltimore to evaluate conditions in that city and recommend to him and the President whether federal troops were necessary. I left for Baltimore by helicopter immediately. I made a personal examination of the riot areas in Baltimore by helicopter and automobile. The President determined to send troops to Baltimore on April 7th, signing the Presidential Proclamation at 10:12 p.m., and the Executive Order at 10:13 p.m. Troops were immediately dispatched to Baltimore. I returned to Washington, D.C. on April 10 or 11, at which time the disturbances in Washington had virtually ceased.

FRED M. VINSON, JR.

DEPUTY CLERK: Arlo Tatum, and others, versus Melvin Laird, and others, Civil Action 459-70.

MR. WULF: Good morning, Your Honor.

THE COURT: Good morning.

MR. WULF: My name is Melvin Wulf, one of the attorneys for the Plaintiffs. We're here on a motion for preliminary injunction in this suit to enjoin the Army from engaging in the collection, storage, and circulation of a large variety of information which we allege is of a constitutional protective nature concerning constitutional protective activity of Plaintiffs in the classes they represent. The Government has filed a motion to dismiss and we are prepared in support of our motion for preliminary injunction to go forward with testimony this morning if the Court is so disposed and we would think that and take the position that it would be to the advantage of the Court if it would hear the testimony before ruling on the Government's motion to dismiss.

THE COURT: Well, why do you need testimony, you've got voluminous affidavits in this case; what would your testimony cover that your affidavits haven't?

MR. WULF: Well, it would supplement the material in the affidavits; but beyond that, the case is now in the posture where the Government alleges it has discontinued the activity which the complaint complains about. However, our complaint is drafted much broader than with respect to the material which the Government claims to have discontinued. We are—we want to show the Court that the res, that the substance of the lawsuit is still in existence and that the Government's assertions about discontinuance are incomplete, that the activity and conduct still goes on in a very, very widespread manner. Our testimony would go to that also, your Honor.

THE COURT: Well, the Government wouldn't want to allege that it has discontinued all of it's activities by any means, would it?—the main contention of the Government is that the activity is proper, whatever it's doing.

MR. WULF: They take that position also. They also do admit that some was either unnecessary, or perhaps, beyond the proper function of the Army and they say they did discontinue particularly two practices, the computer maintained at Fort Holabird United States Army Intelligence Command, and they say they destroyed, or intend to destroy, or rule to destroy, the program for that computer; they've also asserted that they have withdrawn, or intend to withdraw, an identification list which we would like to refer to as the Holabird Black List which is a collection of data about persons engaged in political activity which the Army took the liberty of collecting and putting together in this document. They also made reference to some material collected at the Counter-intelligence Analysis Division which they inferentially said they have not destroyed nor do they intend to, but there is a great deal of other material that is alleged, which we refer to in our complaint and in the subsequent affidavits which contain exactly the same kind of information and which is distributed all over the country at various military installations and about which the Government said nothing at all about any intention to discontinue its collection, or its storage and we can show that the same kind of materials which the Army has confessedly said is beyond its interest or jurisdiction continues to be maintained and stored at other Army installation.

THE COURT: I don't believe in view of all the affidavits in this case that there's any need for any testimony and furthermore, as far as these witnesses are concerned, you have had ample opportunity to get their affidavits already. So I will not permit testimony. Anything else before we start?

MR. WULF: You'll then hear the argument on the motion to dismiss, is that correct, your Honor.

THE COURT: Well, I'll hear both the argument on the motion to dismiss and the argument on your restraining order.

MR. WULF: All right, sir, in that . . .

THE COURT: . . . and since you filed the restraining order first, I'll hear that first.

MR. WULF: In that case, may I move the admission for the purposes of argument on those two matters Professor Frank Askin of the New Jersey Bar who will present the argument on behalf of the Plaintiffs.

(Professor Askin approaching the lectern.)

THE COURT: All right.

MR. ASKIN: Your Honor might I make one other observation in regard to taking testimony this morning, the fact is that the Plaintiffs have brought in a number of witnesses from around the country ready to testify on the preliminary injunction. Of course, it would be appropriate to take their testimony now because it would remain usable under the Federal Rules of Procedure at the final hearing; it would not be necessary to recall them since the witnesses are here and it would seem that it would be appropriate to . . .

THE COURT: Well, Counsellor, as I recall it, the Plaintiffs' Counsel called about this some time ago asked my disposition about taking testimony and I told them that on a motions calendar as such that we only do it when it's absolutely necessary and that they should cover these matters by affidavits. So I think this is no surprise to you. I will not hear witnesses, so you may go ahead.

MR. ASKIN: Yes, your Honor. Are you suggesting that we should then proceed rather than the Government on the motion to dismiss? We should proceed first?

THE COURT: Yes, you filed your motion first, so I'll hear yours first. I shan't rule on it, however, until I hear the other one, too.

Plaintiffs' Argument in Support of the Motion for Preliminary Injunction

MR. ASKIN: Let me proceed, your Honor, by addressing myself to especially the Government's contentions in this case; I think it would be the easiest way in which to lay open before this Court what is really at issue.

The Plaintiffs' complaint and the Plaintiffs' affidavits portray a system that we believe can only be considered disgraceful in the United States of America, a system in which United States military authorities employ hundreds of agents lurking about the country spying on the lawful political activity of American citizens; attending their meetings, on occasion worming their way into the confidence of lawabiding citizens, reporting back their findings to a—some central headquarters of political data-gathering under the Army's command. A teletype network, not . . .

THE COURT: Have they gone into closed meetings, or secret meetings, or anything of that sort?

MR. ASKIN: That's our belief, your Honor.

THE COURT: I don't want your belief, I want your evidence.

MR. ASKIN: Well, we have witnesses here this morning who would be ready to testify to that matter. Now I would have to go back to examine the materials which have already been submitted as to whether or not our affidavits demonstrate that, but we do have witnesses in the Court who are ready to testify to the infiltration.

THE COURT: Why don't you have their affidavits?

MR. ASKIN: Well, your Honor, it was my feeling that on a motion—my original feeling that on a motion for preliminary injunction that it would really be very difficult for the Court to rule on such a momentous question to enjoin—to actually enjoin the Army, which we don't think is to be taken lightly, we would think this would be an important judicial determination. It was my feeling, your Honor, that this really should not be done on the basis of bare, paper testimony, that, in fact the witnesses should be present in Court, should be under

the cross-examination, and should be available for the Court to hear and see. And frankly, your Honor, it was my impression that we would be able to present these witnesses in person.

THE COURT: I think in the future, you'd better follow the direction of the Court and you will get a little further.

MR. ASKIN: Yes, your Honor.

THE COURT: Go ahead.

COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW

THE COURT: The Court holds that what in effect the plaintiffs are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in this country and magazines, and the Court holds that they state no cause of action; they show no unconstitutional action on the part of the Army; they show no threats to their rights. And I will sustain the motion to dismiss and I will deny the preliminary injunction, it following, of course, if it's acceptable to the motion to dismiss, that the great likelihood of plaintiffs maintaining this action is in the view of the Court zeroed. So I will deny the preliminary injunction and grant the motion to dismiss.

Present an order.

MR. MARONEY: Yes, your Honor.

(Whereupon, Court recessed at 11:12 a.m.)

• • • •

April 29, 1970

The Honorable George L. Hart, Jr.
Judge of the United States
District Court for the
District of Columbia
United States Court House
Constitution Avenue & John
Marshall Place
Washington, D.C. 20001

Dear Judge Hart:

In denying the plaintiffs' motion for a preliminary injunction and in granting the government's motion to dismiss, you directed the government to prepare an order reflecting these decisions.

A week has now passed and the government has still not filed a draft order. We are interested in proceeding in the Court of Appeals as quickly as possible and have taken the liberty of preparing a draft order ourselves. We respectfully request that you sign the enclosed order, thereby permitting us to proceed with our appeal.

Sincerely yours,

LAWRENCE SPEISER
Attorney for Plaintiffs

Enclosure

ORDER

Upon consideration of plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss the complaint, it is

ORDERED that plaintiffs' motion is denied, It is

FURTHER ORDERED that defendants' motion to dismiss is granted on the ground that the complaint fails to state a claim upon which relief can be granted.

_____
JUDGE

DATED: _____

ORDER

This cause having come before the Court on April 22, 1970 on plaintiffs' motion for a preliminary injunction, on defendants' opposition thereto and on defendants' motion to dismiss the complaint filed herein on February 17, 1970, and the Court having considered the pleadings, briefs, and affidavits filed herein, and having heard the oral argument of counsel for the respective parties, and it appearing to the Court that plaintiffs fail to state a claim upon which relief can be granted, show no unconstitutional action and allege no unlawful action on the part of the defendants, show no threats to their rights and present no justiciable controversy, and it further appearing to the Court that the defendants' motion to dismiss the complaint should be granted, it is, therefore, by the Court this 29th day of April 1970;

ORDERED, that the defendants' motion to dismiss be, and the same hereby is, granted and that the action be, and the same hereby is, dismissed with prejudice; and it is

FURTHER ORDERED that plaintiffs' motion for a preliminary injunction be, and the same hereby is, denied as moot.

UNITED STATES DISTRICT JUDGE

NOTICE OF APPEAL

Notice is hereby given this 23rd day of April, 1970, that Plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of April, 1970 in favor of Defendants against said Plaintiffs.

LAWRENCE SPEISER
Attorney for Plaintiffs
American Civil Liberties Union
1424 Sixteenth Street, N.W.
483-3830

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,203

ARLO TATUM, CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, ET AL., APPELLANTS

v.

MELVIN B. LAIRD, SECRETARY OF DEFENSE, ET AL.

Appeal from the United States District Court for the District of Columbia

Decided April 27, 1971

[Judgment entered this date]

Mr. Frank Askin, of the bar of the Supreme Court of New Jersey, *pro hac vice*, by special leave of Court, with whom *Messrs. Melvin L. Wulf* and *Lawrence Speiser* were on the brief, for appellants. *Mrs. Hope Beth Eastman* also entered an appearance for appellants.

Mr. Robert L. Keuch, Attorney, Department of Justice, with whom *Messrs. J. Walter Yeagley*, Assistant Attorney General at the time the brief was filed, *Kevin T. Maroney* and *George W. Calhoun*, Attorneys, Department of Justice, were on the brief, for appellees. *Mr. Benjamin Flannagan*, Attorney, Department of Justice, also entered an appearance for appellees.

Before TAMM, MACKINNON and WILKEY, *Circuit Judges*.

Opinion filed by WILKEY, *Circuit Judge*.

Opinion filed by MACKINNON, *Circuit Judge*, concurring in part and dissenting in part.

WILKEY, *Circuit Judge*: On 17 February 1970 appellants, on behalf of themselves and others similarly situ-

ated, filed suit challenging the legality of what appellants term "surveillance of lawful civilian political activity by the U.S. Army," which appellees describe as "gathering by lawful means, . . . maintaining and using in their intelligence activities, any information relating to potential or actual civil disturbances [or] street demonstrations." Appellants sought a declaratory judgment that the Army's present conduct is unconstitutional or otherwise illegal, concomitantly an injunction forbidding future similar activity, and the destruction of all such data hitherto illegally obtained. The United States District Court denied the requested relief and granted appellees' motion to dismiss on the basis of pleadings, affidavits, and oral argument, without testimony of witnesses.

Appellants claim that the Army's intelligence work involves undercover operations by military agents within the civilian community and organizations, maintenance of records at over a dozen regional and national record centers, and distribution of military units and to criminal investigative agencies of lists describing individuals and organizations who have publicly objected to governmental policies. Appellants claim that these domestic activities of the Army go far beyond any legitimate military need, exceed the Army's statutory authority, inhibit political participation and debate, and deprive appellants and others similarly situated of the constitutional rights guaranteed by the First, Fourth, Fifth and Ninth Amendments, *i.e.*, the right to free speech and association, and the right to petition the government for redress of grievances, and the right of privacy.

Appellees assert the constitutional and statutory authority and duty of the President to use such of the Armed Forces as he deems necessary to suppress any insurrection or domestic violence, and point to Defense Department directives regarding the planning for and employment of military resources in the event of civil disturbances, under which one of the responsibilities of the Army is to provide "essential planning, operational and intelligence data to the national military command center and to military service command centers on a timely basis to insure that the national command authorities and ap-

propriate military service command authorities are adequately informed."

For reasons stated hereafter, we find that this court and the District Court have jurisdiction, that there is a justiciable controversy, and that appellants have stated a claim in relation thereto. We therefore remand the case to the District Court for ascertaining essential relevant facts and the determination thereupon of whether any rights of the appellants have been infringed by any actions of the appellees which may be proved.

I. JURISDICTION

Appellants' complaint in the District Court alleged jurisdiction to be based upon the existence of a federal question as contemplated by 28 U.S.C. § 1331, and the requisite $10,000 in controversy. On this appeal [1] the Government contents the allegation of jurisdictional amount, contending that:

> There is no evidence in the record that any of the plaintiffs have a claim in fact for any amount of money, much less a claim for an amount in excess of $10,000.

In response to this argument, appellants in essence admit that their claim is not capable of valuation in monetary terms, but argue essentially that where a challenge to a claimed deprivation of fundamental constitutional rights of intangible value is involved, the purposes for the jurisdictional amount requirement [2] are inapplicable and

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[1] No claim of lack of subject matter jurisdiction was raised in the Government's motion to dismiss in the District Court. This, of course, is no bar to the raising of the issue on appeal. *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908).

[2] The purposes of the jurisdictional amount requirement are, appellants assert, twofold: first, the promotion of federalism by confining federal courts strictly within the limits of their jurisdiction as prescribed by Congress; and, second, the avoidance of consuming the resources of the federal courts in the resolving of "petty" controversies. *See Healy* v. *Ratta*, 292 U.S. 263 (1934), and S. Rep. No. 1830, 85th Cong., 2d Sess. (1958). Neither of these purposes, appellants insist, would be served by denying jurisdiction in the instant case.

that such requirement should therefore not be applied to defeat federal jurisdiction. While there have been mounting expressions of judicial concern over this seeming gap, caused by the jurisdictional amount requirement, in the power of the federal courts to entertain federal question cases of this nature, we find it unnecessary to reach this question in the instant case.[3]

As we recently held in *Peoples* v. *United States Department of Agriculture*:[4]

> The District Court for the District of Columbia has an independent source of jurisdiction in the legislation, passed by Congress, and codified in the District of Columbia Code, 11 D.C. Code § 521, which gives that court general equity jurisdiction, and venue where either party is a resident or found within the District of Columbia. This permits actions for declaratory judgment as well as injunction to be maintained against those whose office in the Federal Government establishes their official residence in the District. *Stark* v. *Wickard*, 321 U.S. 288, 64 S.Ct. 559,

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[3] *See Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 826 (2d Cir. 1967); *Fein* v. *Selective Service System Local Board No. 7*, 430 F.2d 376, 380 (2d Cir. 1970) (dissenting opinion); *Giancana* v. *Johnson*, 335 F.2d 366, 371 (7th Cir. 1965) (dissenting opinion); *Murray* v. *Vaughn*, 300 F. Supp. 688 (D.R.I. 1969); *Boyd* v. *Clark*, 287 F. Supp. 561, 567 (S.D.N.Y. 1968) (dissenting opinion). The American Law Institute has recommended the abolition of the amount in controversy requirement in federal question cases precisely because:

> The few cases that are . . . that must satisfy the § 1331 requirement are likely to involve matters particularly deserving of a federal forum. . . . Cases in which the plaintiff claims violation of his constitutional rights by action of a federal official warrant federal cognizance without the need of demonstrating that the requisite amount is in controversy.

ALI, Study of the Division of Jurisdiction Between State and Federal Courts, 172 (1969). *See also* C. WRIGHT, FEDERAL COURTS, § 32 at 110 (1969); Currie, *The Federal Courts and the American Law Institute* (Part II), 36 U. CHI. L. REV. 268, 292 (1969).

[4] 138 U.S. App. D.C. 291, 294, 427 F.2d 561, 564 (1970).

88 L. Ed. 733 (1944); *Nestor* v. *Hershey*, 425 F.2d 504, at 521-523 (Dec. 16, 1969).[5]

Furthermore, we note that since the Government did not contest the existence of the alleged jurisdictional amount in the District Court, appellants had no opportunity to attempt to sustain their allegation that $10,000 was in controversy, an endeavor at which they might well be successful under the doctrine that, particularly where

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[5] Where a suit seeks equitable relief, and no claim involving personal property, or for debt or damages is made, the District Court for the District of Columbia has "original jurisdiction" without regard for the amount in controversy. *See Norden* v. *Royall*, 90 F. Supp. 834, 835 (D.D.C. 1949); *Patton* v. *District of Columbia*, 180 A.2d 844 (D.C. Mun.App. 1962); *Friedman* v. *District of Columbia*, 155 A.2d 521 (D.C. Mun. App. 1959); Byse & Fiocca, *"Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 325 (1967); 11 D.C. Code §§ 521, 961. Of course, when the District Court entertains such a suit it is exercising powers analogous to those of a state court of general jurisdiction. *Western Urn Mfg. Co.* v. *American Pipe and Steel Corp.*, 109 U.S. App. D.C. 145, 284 F.2d 279 (1960); *King* v. *Wall & Beaver Street Corp.*, 79 U.S. App. D.C. 234, 145 F.2d 377 (1944); *Boardman* v. *Martocchia*, 216 F. Supp. 830 (D.D.C. 1963). And it is unclear whether such a state court would have the power to issue an injunction against a federal officer. *See* Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L. J. 1385 (1964). Nevertheless, it is clear that the reasons creating the doubt as to state courts' power in this respect, stemming from considerations of federal supremacy, do not apply to the District Court for the District of Columbia, which is itself a constitutionally based Article III federal court, albeit one additionally endowed with unique general powers, pursuant to Article I, § 8. *See O'Donoghue* v. *United States*, 289 U.S. 516 (1933).

The foregoing analysis is not affected by the enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358 (29 July 1970) 84 Stat. 473, Title I of which establishes the new Superior Court of the District of Columbia as a court of general jurisdiction equivalent to a state court of similar powers. The instant suit was filed before the 1 February 1971 effective date of the new Act, and therefore properly remains within the jurisdiction of the United States District Court as provided by prior law. District of Columbia Court Reorganization Act of 1970, § 111, 84 Stat. 476, *to be codified as* D.C. CODE ANN. § 11-501(1). *See* Williams, *District of Columbia Court Reorganization, 1970*, 59 GEO. L. J. 483, 540-542 (1971).

purely injunctive relief is sought, the amount in controversy may be measured by either "the value of the right sought to be gained by the plaintiff . . . [or] the cost [of enforcing that right] to the defendant . . . ." [6] In the instant case, it seems likely that if all the relief sought by appellants were granted, including enjoining the operation of the Army's civilian intelligence system and the production and destruction of all records pertaining thereto "maintained by any and all military agencies within the United States and overseas," the cost to the Army of complying with such a decree might well exceed $10,000.

Thus even apart from the applicability of 11 D.C. Code

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[6] *Hedberg* v. *State Farm Mutual Automobile Ins. Co.*, 358 F.2d 924 (8th Cir. 1965) (Blackmun, J.) (dictum). A succinct and oft-quoted statement of this doctrine was put forth by the 10th Circuit in *Ronzio* v. *Denver & R. G. W. R.R.*, 116 F.2d 604, 606 (10th Cir. 1940), as follows:

> In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce.

See Hatridge v. *Aetna Casualty & Surety Co.*, 415 F.2d 809, 814-16 (8th Cir. 1969). *Compare* C. WRIGHT, FEDERAL COURTS, § 34, 117-19 (1969), where the rule allowing the cost to the defendant to be considered is stated to be the "desirable" one, *with* J. MOORE, FEDERAL PRACTICE ¶ 0.9[1] (2d ed. 1964), where the rule is characterized as "contrary" to the prevailing view. While the Supreme Court has never directly passed on this question, *compare St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), *with Horton* v. *Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961), a number of lower federal courts have permitted the cost to the defendant to control the jurisdictional amount issue, *see* cases cited in WRIGHT and MOORE, *supra*. And the Supreme Court's willingness to entertain, without discussion of the jurisdictional basis, the appeal of a federal taxpayer seeking to enjoin the operation of portions of the federal Elementary and Secondary Education Act of 1965 as violating the Establishment and Free Exercise Clauses of the First Amendment, *Flast* v. *Cohen*, 392 U.S. 83 (1968), may well be indicative of the Court's view that jurisdictional amount may appropriately be established from the defendant's viewpoint in certain cases. The Court in *Flast*, in its discussion of the standing issue, noted that "the challenged program involves a substantial expenditure of federal tax funds," 392 U.S. at 103, while nowhere mentioning any alleged monetary value of the plaintiff's claim.

§ 521, since we have found as detailed subsequently that appellants have otherwise stated an adequate and justiciable claim for relief, we would be constrained to permit appellants on remand the opportunity to meet their burden of satisfying the District Court that the requisite amount is in controversy.[7]

For the foregoing reasons we reject the Government's claim that the dismissal should be affirmed for lack of subject matter jurisdiction.[8]

II. JUSTICIABLE CONTROVERSY

In recent years the Army and the National Guard have been called upon to act to preserve domestic peace against violent protests leading to civil disorders, a role for the military which was not unforeseen in our Constitution.[9] Many violent protests were aimed directly at military functions

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[7] *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1935). In establishing that the amount in controversy exceeds $10,000, "[a]bsolute certainty . . . is not essential. . . . Present probability that [the cost to the defendant] will exceed that sum is enough." *Friedman* v. *International Association of Machinists*, 95 U.S. App. D.C. 128, 220 F.2d 808 (1955).

[8] Appellants' complaint did not refer to 11 D.C. CODE § 521 as a basis for jurisdiction of their claim. However, at argument, appellants moved pursuant to 28 U.S.C. § 1653 to amend their complaint to include § 521 in their jurisdictional allegations. Section 1653 provides as follows: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Under this section, "either this Court or the District Court on remand, has power to permit amendment to avoid dismissal under jurisdictional grounds." *Jones* v. *Freeman*, 400 F.2d 383, 387 (8th Cir. 1968). The statute is to be construed liberally in accordance with the congressional intent to provide a means for avoiding the dismissal of suits on technical grounds. *John Birch Society* v. *National Broadcasting Co.*, 377 F.2d 194 (2d Cir. 1967); *Moore* v. *Coats Co.*, 270 F.2d 410 (3rd Cir. 1959). Accordingly, we direct that upon remand of this action appellants be permitted to amend their complaint to allege jurisdiction resting upon 11 D.C. Code § 521.

[9] U.S. CONST. art. I, § 8, cl. 14, 15, 16; art. II, § 2, cl. 1; art. 4, § 4. Article I, § 8 assigns the Power to Congress to define the role of the military in national affairs. The military must therefore confine its activities to those necessary to carry out its functions provided by statute.

and installations themselves, as in ransacking Selective Service offices, barring troop and supply trains by prostrate bodies on the tracks, unlawful attempts to enter military bases or demonstrations thereon, and harassment of defense-oriented businesses. In executing other missions the Army confronted riotous mobs protesting matters unrelated to military operations, for example, the tragic riots in Detroit, Newark, and other of our large cities. During the period 1967-1968 the National Guard was called upon eighty-three times and the Army four times to quell cases of civil disorder.

While these statistics relate to the period of civil disorders during which the Army operated the intelligence system which appellants complain violated their rights, we also note that in the period beginning with the use of the Army paratroops at Little Rock in 1957 the Army has been called upon under related constitutional and statutory provisions to preserve civil peace in order that certain groups might exercise their constitutional rights. The moral of this is that no matter who the persons or groups are giving voice to their protests against the established order, civil disturbance of one kind or another is likely to ensue; and, irrespective of the content or cause of the protest, the military need certain intelligence information to perform their mission "to enforce the laws of the United States" or "suppress . . . insurrection." [10]

In performing this type function the Army is essentially a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the

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[10] 10 U.S.C. §§ 331, 332, 333 (1964). We note, however, that the operation of the intelligence system challenged herein is not sought to be justified by any need to obtain information for the use of the National Guard. At oral argument appellees admitted that no such information has been provided to the Guard on the occasions of its deployment during 1967-68, and would not be provided unless the Guard were called into federal service. With respect to the use of the Guard in Federal service, article 1, § 8, cl. 15 of the Constitution empowers Congress "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman.

No logical argument can be made for compelling the military to use *blind* force. When force is employed it should be intelligently directed, and this depends upon having reliable information—in time. As Chief Justice John Marshall said of Washington, "A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information; . . . ." [11] So we take it as undeniable that the military, *i.e.*, the Army, need a certain amount of information in order to perform their constitutional and statutory missions.[12] The questions are what type of information the military need, how they should go about obtaining it, when they need it, and whether what the Army has done here has infringed any of appellants' rights.

So much for the military's mission and intelligence necessity. As for appellants' contention that their rights, constitutional or otherwise, have been infringed, they have some difficulty in establishing visible injury, at least on this incomplete record. Appellants freely admit that they complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies. There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military

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[11] Foreword, U.S. ARMY BASIC FIELD MANUAL, Vol X, circa 1938.

[12] The President's National Advisory Commission on Civil Disorders recommended:

> Intelligence—The absence of accurate information both before and during a disorder has created special control problems for police. Police departments must develop means to obtain adequate intelligence for planning purposes, as well as on-the-scene information for use in police operations during a disorder.

agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.

Thus the instant case, at this juncture, involves no concrete, identifiable sanctions, no compelled self-identification (except to the extent that the Army may attend meetings thought to be for a faithful few), and no threat of publication. Turning to the authorities claimed to be relevant here, virtually all of the First Amendment cases cited where government activity was enjoined or struck down fall into one of three categories:

> (1) Cases where some legal or criminal sanction was imposed or threatened to be imposed on persons who exercised their First Amendment rights.[13]
>
> (2) Cases involving some element of government compulsion, either to testify regarding one's political ideas or beliefs, or to identify oneself in order to exercise First Amendment rights.[14]
>
> (3) Situations where the Government threatens to publicize the names of allegedly politically controversial persons for the purpose of inhibiting the exercise of their first Amendment rights.[15]

In view of the distinctions in this case from prior decisions, appellees argue that no justiciable controversy ex-

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[13] *E.g., United States* v. *Robel*, 389 U.S. 258 (1967) (criminal prosecution or loss of employment); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) (criminal prosecution); *NAACP* v. *Button*, 371 U.S. 415 (1963) (criminal prosecution, disbarment); *National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 412 F.2d 1103 (1969) (draft reclassification).

[14] *E.g., Lamont* v. *Postmaster General*, 381 U.S. 301 (1965) (compelling affirmative act of requesting delivery of mail thought by the Post Office to be communist propaganda); *Talley* v. *California*, 362 U.S. 60 (1960) (requiring identity on political handbill); *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (requiring filing of membership lists); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), and *Watkins* v. *United States*, 354 U.S. 178 (1957) (compelling testimony).

[15] *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970).

ists, *i.e.*, that nothing has been done, that nothing is contemplated to be done, and even if some action by the Army against appellants were possibly foreseeable, such would not present a presently justiciable controversy.

This position of the appellees does not accord full measure to the rather unique argument advanced by appellants. While appellants do indeed argue that in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to the detriment of these civilian appellants, yet appellants do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, appellants contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on appellants and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech, etc. The baleful effect, if there is one, is thus a present inhibition of lawful behavior and of First Amendment rights.[16]

Under this view of appellants' allegations, under justiciability standards[17] it is the operation of the system

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[16] "The peculiar feature of suits alleging a First Amendment chilling effect . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interest if he *does not* speak or act as he says he wants to." *National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 64, 412 F.2d 1103, 111 (1969). If the Army's intelligence system causes such injury it may be enjoined if the system in operation exceeds the authority granted by Congress, *see Kent* v. *Dulles*, 357 U.S. 116 (1958) and notes 9 and 10, *supra*, or, if within its statutory authority, it nevertheless creates more than an "incidental" burden on First Amendment Rights, and thus violates the Constitution. *See United States* v. *O'Brien*, 391 U.S. 376 (1968).

[17] To "allege the sort of 'case' or 'controversy' referred to in Article III of the Constitution, the source of jurisdiction of the federal courts, . . . the complaint must show that there exists a controversy between the parties with such immediacy and presently adversary character as to require its adjudication." *Davis* v. *Ichord*, No. 23, 426 (D.C. Cir. 20 Aug. 1970).

[Footnote continued on page 140]

[11][Continued]

To the extent that the Army's argument against justiciability here includes the claim that appellants lack standing to bring this action, we cannot agree. If the Army's system does indeed derogate First Amendment values, the appellants are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all of the appellants and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records. Since this is precisely the injury of which appellants complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine, on the issue of whether the actions complained of do in fact inhibit the exercise of First Amendment rights. Nor should the fact that these particular persons are sufficiently uninhibited to bring this suit be any ground for objecting to their standing. *See N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 459 (1958); *Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678, 684 (1970).

Nor does the recent group of Supreme Court decisions limiting the situations in which federal courts may enjoin court criminal proceedings require a different result. *See Younger* v. *Harris*, —— U.S. —— (1971) (39 U.S.L.W. 4201), *Boyle* v. *Landry*, —— U.S. —— (1971) (39 U.S.L.W. 4207) (23 Feb. 1971), and related cases decided the same day. Those cases rest firmly on concepts of Federalism and comity not present in the instant appeal. In *Younger* where certain of the plaintiffs sought standing to attack alleged unconstitutional state statutes on First Amendment grounds, because they claimed to "feel inhibited" by the existence of such laws, the Court stated:

> We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to *enjoin a pending state prosecution*. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs *in such cases*. (Emphasis added.)

The Court went on to hold that even one who has been indicted under a constitutionally suspect state law may not ordinarily seek federal injunctive relief because of the "long standing public policy against federal court interference with state court proceedings . . . ." And in *Boyle*, where "[n]ot a single one of the citizens who brought [the] action had ever been prosecuted, charged, or even arrested under the particular . . . statute which the court below held unconstitutional," the Supreme Court relief on its discussion of the requirements of Federalism in *Younger* to conclude that:

[Footnote continued on page 141]

itself which is the breach of the Army's duty toward appellants and other civilians.[18] The case is therefore ripe

[17][Continued]

the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. *The policy of a century and a half against interference by the federal courts with state law enforcement* is not to be set aside on such flimsey allegations as those relied upon here. (Emphasis added.)

Aside from the fact that, as we have related *supra*, appellants here complain of present injury and not merely speculative future injury, we are not faced in this case with any considerations similar to the policy against federal interference in state court actions which the Supreme Court found controlling in *Younger* and *Boyle*. Furthermore, and highly important here, appellants do not have the "adequate remedy at law" available to the plaintiffs in *Younger* and *Boyle*, in the form of the opportunity to present their constitutional claims to the state court, which the Supreme Court also relied on as a basis for restricting the exercise of federal equitable jurisdiction in such cases.

[18] The analysis of justiciability questions in terms of whether there has been a breach of a judicially identifiable "duty" stems from the Supreme Court's discussion in *Baker* v. *Carr*, 369 U.S. 186, 198 (1962), and *Powell* v. *McCormack*, 395 U.S. 486, 517 (1969). In the latter case the Court, quoting in part from *Baker*, said:

> In deciding whether a claim is justiciable, a court must determine whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."

The Army has both a duty not to exceed its statutory authority and not to infringe first Amendment rights. Appellants claim the Army is doing both; their claim is therefore now justicable, since "the facts alleged, under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant" judicial resolution. *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969), quoting from *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U.S. 270, 273 (1941). That the Army has a legitimate need for certain information need not be denied. The claim here is that in the operation of its intelligence system the Army has gone beyond any legitimate need for information, and in doing so has created a present chilling effect on the "transcendent" values enshrined in the First Amendment. *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). *See* note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808,

for adjudication. Because the evil alleged in the Army intelligence system is that of overbreadth, *i.e.*, the collection of information not reasonably relevant to the Army's mission to suppress civil disorder,[19] and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time.

Only recently this court decided *Davis* v. *Ichord*, in which an attack was made on the maintenance and potential use of files on political dissenters by the House Internal Security Committee. This court there held that no case or controversy was presented because the appellants had failed to establish standing to attack the present use of the files and did not show any concrete indication that the Committee's files would be used against anyone in

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809 (1969) for a discussion of the "substantive" significance of the chilling effect doctrine as relied upon by appellants here. The "judicial determination" of this alleged breach of duty is attainable by identifying those areas in which the Army's activity goes beyond that reasonably relevant to its statutory mission requirements, assuming, of course, that limitation of the Army's system to the extent found reasonably relevant to its civil disorder mission would not itself represent a significant intrusion into protected First Amendment area. *Cf. United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). That this latter assumption is likely to be valid is seen from documents in this record indicating that the Army may have modified its policy and now views its information requirements as limited to "reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control." Letter from Under Secretary of the Army Thaddeus R. Basil to Senator Sam J. Ervin, 20 March 1970 (App. 84, 88). In spite of this recent self-limitation, however, appellants have alleged the actual operation of a system of much broader scope and, further, that previously collected information is still retained in various Army files. We therefore think that the appellants should be allowed to develop fully their contention that the Army collects and maintains information on civilian political activity in excess of its mission requirements, and the Army should have the opportunity to show the relevance of its intelligence data to its civil disorder mission.

[19] "The free exercise of First Amendment rights is perhaps more readily inhibited by a [policy] justifiably suspect as vague or overbroad, because of the uncertainty of its application. . . ." *Davis* v. *Ichord*, No. 23,426 (D.C. Cir. 20 Aug. 1970) (slip op., at 14).

future. Nevertheless, this court in *Davis* did indicate that "among the considerations pertinent to determining the existence of a chilling effect upon the exercise of First Amendment rights which give rise to a case or controversy are the *source of the chill*, the extent to which it focuses upon the conduct of those who allege it, and the likelihood that it will affect that conduct." The court in *Davis* was concerned with the "source of the chill" in order to determine whether the threat of *future* injury was sufficiently substantial to provide the necessary ripeness to the controversy.

Nevertheless, in view of this country's long-established tradition against military involvement in civilian politics, we think it significant that here the "source of the chill" is the Army, as opposed to the situation in *Davis* where the House Committee could point to a legal basis for the collection of such files pursuant to its designated function to investigate propaganda. We think the Army has a legal basis for the collection of intelligence information relevant to its constitutional and statutory mission, but on the record before us we cannot say that the intelligence system as designed and operated does not go beyond that which would be justified by the Army's mission. The Army system here is apparently of a much broader scope than the files involved in *Davis*, and we held in *National Student Association* v. *Hershey*[20] that "the severity and scope of the alleged chilling effect on First Amendment freedoms" is a factor to be considered in determining justiciability. It is arguable that the existence of a system with the broad scope as alleged by appellants would affect the conduct of persons in the class that appellants claim to represent.[21]

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[20] 134 U.S.App.D.C. 56, 68, 412 F.2d 1103, 1115 (1969).

[21] The dissent suggests that the instant suit may not be appropriate for treatment as a class action under Rule 23, Fed. R. Civ. P. While we recognize that the nature of the appellants' claims and the potentially large number of persons they propose to represent pose difficult questions as to the amenability of their claims to Rule 23 treatment, this question was not considered by the trial court, has not been argued by the parties, and is not presented in the instant appeal. We therefore do not pass on it here. On re-

Referring to our holding in *Davis* that the "source of the chill' is important in determining whether there is any inhibiting effect on the exercise of First Amendment rights, we think that there is a significant difference between investigative actions taken by a military agency in reference to civilians and similar investigative actions taken by a regular investigative agency of a civilian branch of the Government.[22]

One of the functions of a civilian investigative agency, such as the Federal Bureau of Investigation, is to com-

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mand, the trial court will have the opportunity, illuminated by the arguments of the parties, to determine to what extent the class treatment of appellants' claims is appropriate. In this connection we note the considerable flexibility afforded the trial judge under Rule 23 to treat the suit as a partial class action (Rule 23(c)(4)(A)), establish subclasses (Rule 23(c)(4)(B)), and to defer final decision on class action issues until after discovery or further development of the factual bases for the claims alleged. *See* 3B J. MOORE, FEDERAL PRACTICE, ¶ 23.45[1] at 23-707 (1969). This latter course would seem particularly appropriate here, where because of the very nature of the system alleged to be the cause of the complained of injury, the full facts with respect to the scope of its operation and the numbers of persons affected thereby, are, at the present state of the proceedings, primarily within the exclusive knowledge of the defendants.

We further note, in response to the concerns expressed by the dissent, that the fact that a proposed class contains a great number of members does not itself necessarily preclude class action treatment, *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), nor, in suits seeking injunctive or declaratory relief, is the court necessarily required to look into the particular circumstances of each member of the proposed class in determining whether class action treatment is appropriate. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968).

[22] On oral argument counsel for appellants admitted that there is a material difference in the impact of the same intelligence gathering and distribution, depending on whether it is performed by the military or by civilian investigative agencies such as the FBI. Counsel was unwilling to concede that, as to content, any of the information complained of could be compiled by either type agency, not even to the extent of compiling a list of previously convicted fomenters of civil disturbance; and as to time, counsel asserted that such information as was compiled should be given on the spot to the military force by a civilian agency. So extreme a limitation on the gathering and timely dissemination of any information would render it useless.

pile information on law violators, agitators of violence, and possible subversives. It has always been recognized that this is a delicate function, and it is exercised under the direction of the Attorney General. Investigation is performed by men a majority of whom are lawyers or who have had considerable legal training, under the direction of lawyers in the Justice Department, and the information compiled is only usable and effective through court action. The FBI is powerless to imprison anyone or to affect his liberty in any way except through the action of the courts.

The Army or other military, in contrast, are not concerned with law violations. And, in sharp distinction to the FBI and other investigative agencies, they definitely command their own force to exercise at the will of their own commanders. The military are not accustomed to effecting their will through courts and legal processes. Indeed, the employment of military personnel in civil disorders itself implies at least a partial breakdown of law and order, a breakdown of normal processes of law through courts.

The compilation of data by a civilian investigative agency is thus not the threat to civil liberties or the deterrent on the exercise of the constitutional right of free speech that such action by the military is, because a civil investigative agency has no inherent power to act against an individual, that power always being subject to the well-defined restrictions of law and the approval of the courts. The military have no such restrictions; they have their own force (of incomparable power), they have their own commanders trained as soldiers not lawyers, the military's vast size may make civilian control of individual or small unit actions more theoretical than actual, and the military is not accustomed to operating within the restrictions of law and the processes of courts.[23]

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[23] *Cf. National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 71, 412 F.2d 1103, 1118 (1969), where, in a suit challenging a Selective Service policy as inhibitive of First Amendment rights we said:

> It is no reflection on the competence or integrity of selective service personnel to observe that they are ill-equipped to deter-

It is highly important for the safety of the country that to the extent consonant with the performance of the military's mission a separation of sensitive information and military power be maintained, as a separation of match and powder. In an emergency or anticipation of an emergency the military power can be supplied the necessary information from civilian investigative agencies; these two ingredients, potentially dangerous when combined, can be put together by a responsible President and his Cabinet officers as the emergency demands. But to permit the military to exercise a totally unrestricted investigative function in regard to civilians, divorced from the normal restrictions of legal process and the courts, and necessarily coupling sensitive information with military power, could create a dangerous situation in the Republic.

The appellants have not had an opportunity to establish (and may never establish) their far-sweeping claims as to the character of the information gathered and the operation of the system established by the Army. We were informed by appellees' counsel on oral argument that on 6 March 1970 the Secretary of the Army by directive to the Chief of Staff limited the intelligence activities here complained of and directed the personnel responsible to concentrate on the more important and likely sources and locales of violence. Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. If the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of

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mine questions of law as delicate and complex as those commonly raised by anti-war protest activity. Draft boards do not employ judicial procedures, and their members often have no legal training. Rightly or not, registrants are also likely to have less confidence in the constitutional sensitivity of their draft borad, especially in the area of war dissent, than in that of the prosecutor and the courts.

activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights. Appellants have, therefore, stated a claim upon which relief can be granted.

III. REMAND

Having found that this court and the District Court have jurisdiction, that a justiciable controversy exists, and that appellants have stated a claim upon which relief could be granted, we think the record now before us is much too incomplete for a court to determine the ultimate questions of whether the Army has infringed any rights of the appellants and whether appellants are entitled to any injunctive relief. We therefore remand the case to the District Court for the determination of the following principal (and any related) points:

1. The nature of the Army domestic intelligence system made the subject of appellants' complaint, specifically the extent of the system, the methods of gathering the information, its content and substance, the methods of retention and distribution, and the recipients of the information.

2. What part, if any, of the Army domestic intelligence gathering system is unrelated to or not reasonably necessary to the performance of the mission as defined by the Constitution, statutes, military regulations, and as interpreted by actions under those written definitions of the mission.[24]

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[24] *Cf. Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678, 689 (1970), where the New Jersey Supreme Court reversed a lower court decision enjoining the statewide operation of a civil disorder intelligence system by the New Jersey State Police. The court there held that the operation of the intelligence system was at least partly pursuant to a valid governmental interest and should not have been enjoined by the trial court in a summary judgment proceeding. Rather, the court held that a full hearing should be conducted to determine whether the scope of the challenged intelligence system was overbroad in view of both the legitimate state interest in collecting information for planning for and preventing civil disorders and the possible burden on the exercise of First Amendment

3. Whether the existence of any overbroad aspects of the intelligence gathering system, as determined above, has or might have an inhibiting effect on appellants or others similarly situated.

4. Such relief as called for in accordance with the above established law and facts.

Reversed and Remanded.

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: While I concur in many of the pronouncements in the majority opinion I respectfully dissent from the result. My opinion is based on the facts of the case which emerge from the pleadings, affidavits and the admissions made to the trial court. In the hearing before the trial judge, counsel admitted that in the facts upon which they based their complaint the named plaintiffs were not aggrieved by the acts of the appellees:

> Our Plaintiffs this morning, for example, are *not people, obviously, who are cowed and chilled*; they've come into Court, but they have to represent millions of Americans not nearly as forward, as courageous, as willing as them to open themselves up to public investigation and public scrutiny. We're not—you

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freedoms involved. With regard to its remand order, the court stated:

> In short, if it should be found that the police are gathering information which they could not reasonably believe to be relevant to the police function . . . and that circumstances warrant judicial intervention on that account, the injunctive order must be precisely limited to the offending material or practice. The order must not interfere with police activity that is proper, either in direct terms or because of the vagueness of the restraint.

A similar evaluation must be made in the instant case, with due account given to the differences in function and role between the police and the Army, in dealing with and seeking to prevent civil disorder, and relief, if any, should be appropriately tailored so as not to interfere with legitimate Army activity.

> know, every citizen is not a Tom Payne; they're few and far between.

Tr. 17 (emphasis added).

This admission that the governmental activities they attack did not cause any substantial infringement of their constitutional rights constitutes a basic denial of practically their whole case. There still remains the allegation that the existence of the files and information operates to deny them their constitutional right of association with others who are chilled, but the chill to this amorphous group in turn is grounded in the unrealistic and speculative fear that the Government will improperly use the information against them.[1] The critical information relates to reports of public activities of individuals who *publicly* participate in gatherings and demonstrations which tend to civil disorders and in related activities.[2]

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[1] As the majority points out, appellants vigorously assert that they are not here attacking the legality of the many uses the Army might make of the information it is presently gathering; they are not basing their complaint on the possibility of future injury. Rather they assert that the present inhibitory effect of the Army's surveillance system is the only injury about which they complain; the nature of the sanctions which might be imposed on them at some future time are to them here irrelevant.

To my mind, this attempted distinction is untenable. Any present inhibition which they suffer must be based wholly on a fear, specific or general, of future consequences stemming from use of the Army's information. At the same time, they have alleged no present use, preparation for use or selectivity in gathering information by the Army which would reasonably justify such fears. This is not a situation comparable to the one facing the Court in Lamont v. Postmaster General, 381 U.S. 501 (1965), where, in order to receive certain mail, a person was required to tell the Government that he desired to receive "communist propaganda" or in Shelton v. Tucker, 364 U.S. 479, 486 & n.7 (1960) where there was a realistic fear that information gathered from individuals would be misused. Any inhibition which appellants in this case suffer is attributable, not to what the Army is presently doing, but to their own imagination as to what it might do at some unknown time in the future. Therefore, it is inaccurate to contend that the Army's present surveillance activity is the source of the inhibitions which appellants allege. *Compare* Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968).

[2] There are no allegations that the Army has conducted surveillance of wholly private activity and at oral argument appellants

Appellees gathered this information from public sources and open meetings in much the same manner that newspapers cull information. However, there is one difference, *i.e.*, the newspapers publish much of the information they obtain, whereas the Army merely retains it for possible use by it in the future and this may not necessarily include any publication of the information. Such information is intended to be used to help suppress civil disorders in the event the military are called out in conformance with statute[3] for that purpose. Other

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indicated, in effect, that they did not have any witnesses who would testify that the Army had engaged in such activity. *Compare* Local 309, United Furniture Workers of America v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948).

[3] Statutory authority for the Army's activity in relation to civil disorders is contained in 10 U.S.C. §§ 331-33 (1964):

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

10 U.S.C. § 331.

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

10 U.S.C. § 332.

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—
>
> (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that

obvious proper uses by the Army for such information may be judicially noticed from public incidents of the period and would include helping prevent and solve crimes involving destruction, threat of destruction, or theft of military draft records, military supplies, military research and other Government property and facilities at draft centers, armories, military bases, forts, arsenals, military training centers and military suppliers and research centers operating under military contract.

In the instant complaint there are no allegations or claims that any of the information gathered by the Army has been used in a manner that has injured plaintiffs or imposed on them any penalty attributable to their exercise of their First Amendment rights. In fact, appellants acknowledge in their brief that the uses to which the collected information might be put by the Army are *unknown*:

> In the case at bar there is something more subtle at stake than the threat of prosecution and criminal sanctions present in *Dombrowski*, *supra*. There is a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the defendants' civilian intelligence network. *This creates a substantial chilling effect upon the free and uninhibited exercise of First Amendment rights.*

(Emphasis added) (App. br. p. 40).

Such indefinite and abstract assertions of amorphous fears do not present a case involving facts of a concrete nature. Appellants' admission, *supra*, that the "threat"

State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

10 U.S.C. § 333.

of which they complain is "unknown," as the latter words is used by appellants, means that the threat is

> "Not knowable . . . cannot be comprehended . . . beyond the limits of human experience, or of human powers of apprehension or understanding." *Webster's International Dictionary* (2d ed.)

Such indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding, do not present a case involving facts of sufficient realism and definiteness to confer jurisdiction on the court to make a sweeping constitutional decision affecting important activities of the federal Government. There is nothing more here than a highly abstract claim based on an imaginary fear that governmental power to collect information for a valid purpose will be misused for an *improper* purpose. Similar fears might exist with respect to any governmental power. All power is susceptible of misuse, but that truism when coupled with unfounded fear alone is not sufficient to make out a case for judicial jurisdiction. What is necessary before a court is authorized to assume jurisdiction is some allegation from which it can be concluded that the apprehension of the misuse of governmental power is a realistic possibility. Because of the absence of any such allegation here it is my view that a proper case or controversy does not exist. *Davis* v. *Ichord*, —— U.S.App.D.C. ——, —— F.2d ——, (Nos. 23426 & 23427, Aug. 20, 1970); *Golden* v. *Zwickler*, 394 U.S. 103, 108, 110 (1969).

Since the claim of the named plaintiffs does not present a case or controversy, nothing is added by the fact that it has been framed as a class action. *Davis* v. *Ichord*, *supra*, slip op. at 16 n.19. *See generally* 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 567 at 308 (Wright rev. 1961); 3 J. MOORE, FEDERAL PRACTICE ¶ 24.04 (1969). As Judge Johnsen remarked in *Kansas City, Mo.* v. *Williams*, 205 F.2d 47, 51 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953):

> It is of course necessary generally that a plaintiff be able to show injury to himself in order to entitle

him to seek judicial relief. He cannot be a mere volunteer and ask judicial intervention simply "because someone else may be hurt", but he "must present facts sufficient to show that his individual need requires the remedy for which he asks." McCabe v. Atchison, T. & S. F. Ry. Co., 235 U.S. 151, 162, 164, 35 S. Ct. 69, 71, 59 L.Ed. 169.

Moreover, even if I were to agree with the majority that appellants' claim was ripe, I would seriously question whether the action was an appropriate class action. When one considers the great number of people that the named plaintiffs seek to represent, their highly varied backgrounds and activities, and that it is the constitutional right of the individual that is sought to be protected, it is obvious that a great many highly individualized questions would be presented. The record of each protestor, and each protest activity, might have to be considered separately and might necessarily result in different determinations as to whether the Army was justified in making a record of his public activities for possible future reference. Under such circumstances there is a serious question whether the complaint presents "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2).[4] *See generally Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). The importance of this requirement is heightened by recognition of the vast numbers of people appellants seek to have rise *or fall* on the strength of the showing they make in this suit. *See* FED. R. CIV. P. 23(c)(3).

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[4] FED. R. CIV. P. 23(a) provides:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

It should also be noted that it is Congress that is empowered by the Constitution "to make rules for the Government and regulation of the land and Naval forces" (U.S. CONST. Art. I, § 8, cl. 14) and judicial notice may be taken that Congress is presently conducting public hearings upon the policy questions involved in this very area where the named plaintiffs here seek judicial intrusion.[5]

Finally, the trial court here concluded:

> The Court holds that what in effect the plaintiffs are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in this country and magazines,[6] and

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[5] 117 CONG. REC. S. 985 (daily ed., February 8, 1971) reports the announcement by Senator Ervin that the Senate Judiciary Subcommittee on Constitutional Rights had scheduled hearings on Computers, Data Banks and the Bill of Rights. On September 8, 1970, Senator Ervin outlined the purpose and scope of the study. In this regard, it is well to note that the issues appellants seek to have litigated in this suit are tremendously complex, involving broad questions of both law and policy. Recognition of this complexity, recognition of the fact that courts generally become less and less able to deal competently with controversies the farther removed they are from the "impact of actuality" and recognition of the "legitimating function" of a judicial decree, *see* A. BICKEL, THE LEAST DANGEROUS BRANCH 30-31 (1962), all counsel against finding the present controversy ripe too early. In my view, resolution of the issues presented by appellants is much better undertaken, at this juncture, by the Congress than it is by this court.

[6] There was a great deal of material in which the Army had an obviously legitimate interest stemming from the following factual situation, as outlined in the brief of appellee:

> [O]ur Nation, during the Summer of 1967, witnessed the tragic riots in Detroit and Newark and, for the first time in 25 years, the Army was called in to assist the local civilian authorities in quelling the Detroit disturbances. During the period 1967-68, the National Guard was called upon 83 times and the Army four times to quell cases of civil disorder. The March on the Pentagon, the disturbances at the Democratic Convention, and the rioting in the Nation's Capital, which left large areas of the City leveled, all required the use of the

> the Court holds that they state no cause of action; they show no unconstitutional action on the part of the Army; they show no threats to their rights. And I will sustain the motion to dismiss and I will deny the preliminary injunction . . . .

It is my view that we should affirm the action of the trial court and wait until a case appears involving some person who alleges a more tangible basis for the claimed threat to his rights. Certainly since these investigative activities began in 1965, if they were the great peril to the populace that appellants argue, there must be one individual who can be found to complain of an injury caused by a concrete threat of the *actual misuse* of such information. To the extent indicated above, I respectfully dissent.

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armed forces to bring order out of the chaos. It has been reported that during the month of April 1968 alone, there were 237 civil disorders, 27,000 arrests, 43 deaths, over 58 million dollars in property damages, and over 58,000 National Guard and Army troops had to be used 25 times to quell the civil disturbances. *U.S. News and World Report,* September 2, 1968. See also the Brandeis University Lemberg Center for Study of Violence Reports; *Disorders—1968,* by the General Adjustment Bureau, Inc.; *Riot and/or Civil Commotion Report* by the American Insurance Association.

SUPREME COURT OF THE UNITED STATES

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, ET AL.,
PETITIONERS

v.

ARLO TATUM, ET AL.

ORDER ALLOWING CERTIORARI—Filed November 16, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

★ U. S. GOVERNMENT PRINTING OFFICE: 1971 481126 338

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

MELVIN B. LAIRD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ARLO TATUM ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and other federal officers, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*) are not yet reported. The opinion of the district court (App. C, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1971 (App. B, *infra*). Mr. Justice Black

extended the time for filing a petition for a writ of certiorari to August 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether plaintiffs' claim—that the mere existence of a domestic surveillance system within the Department of the Army generates a chilling effect on the exercise, by persons other than plaintiffs, of First Amendment rights—is justiciable under Article III and is one that plaintiffs have standing to raise.

STATEMENT

On February 17, 1970, plaintiffs, on behalf of themselves and others similarly situated, instituted this class action challenging the legality of Army intelligence operations insofar as they relate to undercover surveillances of "lawful civilian political activity" (App. A, *infra*, p. 14), including potential or actual civil disturbances and street demonstrations. Such activities, plaintiffs claimed, "go far beyond any legitimate military need, exceed the Army's statutory authority, inhibit political participation and debate, and deprive [them] and others similarly situated of the constitutional rights guaranteed by the First, Fourth, Fifth and Ninth Amendments" (App. A, *infra*, p. 14). They sought a declaratory judgment that the Army's domestic surveillance activity is unconstitutional or otherwise illegal, preliminary and permanent injunctions forbidding all such activity in the future, and a mandatory injunction ordering the Army to turn over to the court for destruction all in-

formation obtained by such intelligence work which it then had on hand (App. A, *infra*, p. 14).[1]

On March 20, 1970, defendants moved in the United States District Court for the District of Columbia to dismiss the class action on grounds, *inter alia*, that there existed no justiciable case or controversy, and that the court lacked jurisdiction over the subject matter. The motion was heard on April 22, 1970. By order entered April 29, 1970, the district court granted defendants' motion to dismiss and denied plaintiffs' motion for a preliminary injunction. Its order was based on the court's finding (App. C, *infra*, p. 47), "that plaintiffs fail to state a claim upon which relief can be granted, show no unconstitutional action and allege no unlawful action on the part of the defendants, show no threats to their rights and present no justiciable controversy * * *."

Plaintiffs then took an appeal to the Court of Appeals for the District of Columbia Circuit, and a divided panel of the court of appeals reversed.[2] The majority concluded that, "[b]ecause the evil alleged

[1] Plaintiffs' subsequent motion for a temporary restraining order, seeking to halt all current intelligence activity of the Army of the type set forth in their complaint, was denied by the district court on March 13, 1970.

[2] Judge MacKinnon, while concurring "in many of the pronouncements in the majority opinion" (App. A, *infra*, pp. 35–36), dissented from the result on the ground that plaintiffs' "indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding, do not present a case involving facts of sufficient realism and definiteness to confer jurisdiction on the court to make a sweeping constitutional decision affecting important activities of the Federal government" (App. A, *infra*, p. 40).

in the Army intelligence system is that of overbreadth, *i.e.*, the collection of information not reasonably relevant to the Army's mission to suppress civil disorder, and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time" (App. A, *infra*, pp. 28–29; footnote omitted). It remanded the case to the district court for further proceedings.

REASONS FOR GRANTING THE WRIT

The decision below expands the jurisdiction of federal courts, as defined and limited by Article III of the Constitution, to permit adjudication of constitutional claims not ripe for determination. In concluding that plaintiffs' claim comes within the constitutional grant of jurisdiction to the federal courts which is limited to "Cases" or "Controversies," the court of appeals resolved questions of standing and justiciability in a manner inconsistent with decisions of this Court and of other courts of appeals. Its ruling compromises the prohibition implicit in Article III against federal courts passing on indefinite and abstract assertions and issuing advisory opinions; it thus warrants immediate consideration by this Court.

1. "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, *Federal Courts* 34 (1963). As this Court stated in *United States* v. *Fruehauf*, 365 U.S. 146, 157, "such advance expressions of legal judgment upon issues which remain unfocused" are inappropriate because they "are

not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests * * *." Moreover, "[w]hen the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Flast* v. *Cohen*, 392 U.S. 83, 96–97.

In the instant case, the federal courts have been asked to enjoin domestic surveillance activity being conducted by the Department of the Army. There is, however, no assertion that such activity has caused injury to plaintiffs, or others similarly situated. As noted by the court below (App. A, *infra*, p. 23):

> [Plaintiffs] freely admit that they complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies. There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.

Nor do plaintiffs allege that the information that has been obtained by the Army through this intelligence work has been, or is being, used improperly against them (App. A, *infra*, pp. 25–27).

Rather, the contention in this case is that the possible presence of Army personnel at public gatherings, civil disturbances and street demonstrations, for purposes of carrying out domestic surveillance operations, might inhibit the attendance or free speech of certain individuals, and thus have a chilling effect on First Amendment rights. But, as plaintiffs readily conceded in the court below. (App. A, *infra*, p. 39):

> In the case at bar, there is something more subtle at stake than the threat of prosecution and criminal sanctions present in *Dombrowski* [v. *Pfister*, 380 U.S. 479]. There is a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the defendants' civilian intelligence network. *This creates a substantial chilling effect upon the free and uninhibited exercise of First Amendment rights.* [Emphasis added in court of appeals' opinion.]

This threat of the "unknown" is not sufficient to invoke the judicial process. As stated in *Golden* v. *Zwickler*, 394 U.S. 103, 110, "The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." And see *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–90. Only last term, this Court declined to entertain constitutional contentions similar to those presented in the present case on the ground that the plaintiffs'

fears were too "imaginary [and] speculative" to require judicial intervention. *Younger* v. *Harris*, 401 U.S. 37, 42; and see *Samuels* v. *Mackey*, 401 U.S. 66; *Boyle* v. *Landry*, 401 U.S. 77; *Dyson* v. *Stein*, 401 U.S. 200; compare *Perez* v. *Ledesma*, 401 U.S. 82.

To be sure, as noted in the margin of the majority opinion below (App. A, *infra*, pp. 26–27, n. 17), those cases rested on principles of Federalism. But, the concept of separation of powers prescribed by the Constitution is no less firmly entrenched in our system of government. It is that concept which, in significant part, sustains the doctrine of justiciability. See *Flast* v. *Cohen*, *supra*, 392 U.S. at 96–97; *Communist Party of the United States* v. *Subversive Activities Board*, 367 U.S. 1, 71–72. Where, as here, "the federal judicial power is invoked to pass upon the validity of actions by the * * * Executive [Branch] of the Government" (*Flast* v. *Cohen*, *supra*, 392 U.S. at 96), more is needed to sustain jurisdiction than the vague assertions made in this case, which, as accurately noted by the dissent below (App. A, *infra*, p. 40), involve no more than "indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding * * *." See, *e.g.*, *National Student Association* v. *Hershey*, 412 F. 2d 1103, 1110 (D.C. Cir.); *Lampkin* v. *Connor*, 360 F. 2d 505, 507 (D.C. Cir.); *Garcia* v. *Brownell*, 236 F. 2d 356, 357–358 (C.A. 9); *Brown and Root, Inc.* v. *Big Rock Corporation*, 383 F. 2d 662, 666 (C.A. 5); *American Dietaids Co.* v. *Celebrezze*, 317 F. 2d 658, 660 (C.A. 2).

2. It is well settled that plaintiffs, in order to have standing to challenge the activity questioned here, must demonstrate "a personal stake in the outcome of the controversy." *Baker* v. *Carr*, 369 U.S. 186, 204. "[L]itigants who have not been harmed or threatened with immediate harm by administrative action have no standing to attack it." *Danville Tobacco Association* v. *Freeman*, 351 F. 2d 832, 833 (C.A.D.C.). Thus, as this Court stated in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 152, an essential requirement of standing is that "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."

If, as the majority below found (App. A, *infra*, p. 25), the harm, or threat of harm, in this case is measured in terms of the "*present inhibiting effect*" on the exercise of First Amendment freedoms of speech and association, generated solely by the "*present existence of this* [military surveillance] *system*,"[3] plaintiffs are not proper parties to request adjudication of the constitutional issues raised. By their own admission in the court below (App. A, *infra*,

[3] On March 6, 1970, the Secretary of the Army by directive to the Chief of Staff limited the intelligence activities complained of in the present case and directed the personnel responsible to concentrate on the more important and likely sources and locales of violence. See App. A, *infra*, pp. 33–34. In view of this change, questions relating to the possible chill that might have been generated by the existence of a now-obsolete system are largely academic. Cf. *Davis* v. *Ichord*, 442 F. 2d 1207, 1211–1212. No claim has been made by plaintiffs that this more limited surveillance activity will have a "present inhibiting effect" on the exercise of First Amendment rights.

p. 36), they "are not people, obviously, who are cowed and chilled." Rather, they have come forward to assert the present inhibitory effect of such a system "to represent millions of Americans not nearly as forward, as courageous, as willing as them to open themselves up to public investigation and public scrutiny" (*ibid.*).

When the parties themselves have suffered no injury and do not occupy an adversary position sufficient to invoke a federal court's jurisdiction, their claim of representation of a class cannot provide the necessary nexus to the constitutional infringement alleged to enable them to maintain the suit. *Watkins* v. *Chicago Housing Authority,* 406 F. 2d 1234, 1235–36 (C.A. 7); *Kansas City, Mo.* v. *Williams,* 205 F. 2d 47, 51–52 (C.A. 8), certiorari denied, 346 U.S. 826; cf. *Bailey* v. *Patterson,* 369 U.S. 31, 32–33. It is not enough that a plaintiff simply "* * * alleges a First Amendment chilling effect and shivers in court * * *." *National Student Association* v. *Hershey,* 412 F. 2d 1103, 1114 (C.A.D.C.). As recently pointed out by a separate panel in the District of Columbia Circuit in *Davis* v. *Ichord,* 442 F. 2d 1207, 1216 n. 19:

> There may be cases where injury that is done or immediately threatened to some members of a defined group of which a plaintiff is a party may be sufficient to give rise to a chilling effect upon the plaintiff; but the mere bringing of an action as a class action on behalf of "all persons who seek to exercise freely their rights guaranteed in the First Amendment" does not

avoid the requirement of the specificity necessary to state a case or controversy.[4]

Nor do plaintiffs stand on firmer footing if their complaint is deemed to be based on the possibility of future injury (see App. A, *infra*, pp. 36–37 n. 1). Perhaps some, if not all, of the plaintiffs "have been the subject of Army surveillance reports and their names have appeared in the Army's records" (App. A, *infra*, p. 26 n. 17). But, they do not complain that

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[4] In *Davis*, plaintiffs asserted, *inter alia*, that a House Committee had compiled thousands of dossiers on political protestors which it had made available, unlawfully, to both government and private groups for the purpose of harassing and intimidating members of the class plaintiffs claimed to represent. The court of appeals (Judge Leventhal concurring on separate grounds), in holding that the controversy was not justiciable and that plaintiffs had no standing to seek injunctive relief against further use by the House Committee of the dossiers, stressed that "[t]he Supplemental Complaint * * * seeks to bring appellees into conflict with appellants only by alleging the use or threat of use of dossiers in a manner harmful not to appellants but to others, in the exercise of their constitutional rights * * *." (442 F. 2d at 1212.)

The majority in the instant case distinguished *Davis* on the ground that the "source of the chill" in *Davis* was not the Army, but was a civilian investigative agency. Where the investigation or surveillance is performed by the military, it concluded (App. A, *infra*, pp. 31–32), there is a greater likelihood that the surveillance activity will have a "chilling effect," since "the military is not accustomed to operating within the restrictions of the law and the processes of the courts." Even if that statement is sound, however—and we think it is not—the argument suggests that the proper course is thus to await a case presenting concrete evidence of unlawful inhibitory action by the military, or a real threat of misuse of information; the issues should not now be adjudicated on this record which presents only abstract legal issues involving, at best, the speculative impairment of constitutional rights.

the information was obtained improperly.[5] The reports all relate to "public activities of individuals who *publicly* participate in gatherings and demonstrations which tend to civil disorders and in related activities" (App. A, *infra*, p. 37). Cf. *Anderson* v. *Sills*, 56 N.J. 210, 265 A. 2d 678 (Sup. Ct. N.J.).

As pointed out in the dissenting opinion below (App. A, *infra*, pp. 37–39), there are a number of uses to which such information can legitimately be put by the military. While it is, of course, possible that the Army might in the future misuse the information, plaintiffs concededly (App. A, *infra*, p. 25) "have alleged no present use, preparation for use or selectivity in gathering information by the Army which would reasonably justify such fears" (App. A, *infra*, p. 36 n. 1; compare *Lamont* v. *Postmaster General*, 381 U.S. 301; *Shelton* v. *Tucker*, 364 U.S. 479, 486 n. 7); Article III precludes consideration at this point of unlikely but conceivable misuses of information obtained about plaintiffs. In these circumstances, we submit, the question of justiciability in this case is indistinguishable from the similar issue raised in *Davis* v. *Ichord, supra*, and the decision in that case applies with equal force here (442 F. 2d at 1215–1216):

> Nor does the possible use of information in the Committee's files give rise to an Article III case or controversy between these parties. It is not claimed that any nonlegislative use of the Committee's files is authorized by the Commit-

[5] It is not alleged that the Army has conducted surveillance of wholly private activity. Compare *Local 309, United Furniture Workers of America* v. *Gates*, 75 Supp. 620 (N.D. Ind.).

tee's mandate, no matter how broadly construed by appellants; and appellants do not allege except as we have indicated that the files have been or will be used to their personal detriment. We think in a frontal attack of this sort upon the Committee some existing or threatened adverse action by the present Committee more directly associated with the suitor must be alleged.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1971.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 24203

ARLO TATUM, CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, ET AL., APPELLANTS

v.

MELVIN B. LAIRD, SECRETARY OF DEFENSE, ET AL.

Appeal From the United States District Court for the District of Columbia

Decided April 27, 1971

Mr. Frank Askin, of the bar of the Supreme Court of New Jersey, *pro hac vice,* by special leave of Court, with whom *Messrs. Melvin L. Wulf* and *Lawrence Speiser* were on the brief, for appellants. *Mrs. Hope Beth Eastman* also entered an appearance for appellants.

Mr. Robert L. Keuch, Attorney, Department of Justice, with whom *Messrs. J. Walter Yeagley,* Assistant Attorney General at the time the brief was filed, *Kevin T. Maroney* and *George W. Calhoun,* Attorneys, Department of Justice, were on the brief, for appellees. *Mr. Benjamin Flannagan,* Attorney, Department of Justice, also entered an appearance for appellees.

Before TAMM, MACKINNON and WILKEY, *Circuit Judges.*

Opinion filed by WILKEY, *Circuit Judge.*

Opinion filed by MACKINNON, *Circuit Judge,* concurring in part and dissenting in part.

WILKEY, *Circuit Judge:* On 17 February 1970 appellants, on behalf of themselves and others similarly situated, filed suit challenging the legality of what appellants term "surveillance of lawful civilian political activity by the U.S. Army," which appellees describe as "gathering by lawful means, * * * maintaining and using in their intelligence activities, any information relating to potential or actual civil disturbances [or] street demonstrations." Appellants sought a declaratory judgment that the Army's present conduct is unconstitutional or otherwise illegal concomitantly an injunction forbidding future similar activity, and the destruction of all such data hitherto illegally obtained. The United States District Court denied the requested relief and granted appellees' motion to dismiss on the basis of pleadings, affidavits, and oral argument, without testimony of witnesses.

Appellants claim that the Army's intelligence work involves undercover operations by military agents within the civilian community and organizations, maintenance of records at over a dozen regional and national record centers, and distribution to military units and to criminal investigative agencies of lists describing individuals and organizations who have publicly objected to governmental policies. Appellants claim that these domestic activities of the Army go far beyond any legitimate military need, exceed the Army's statutory authority, inhibit political participation and debate, and deprive appellants and others similarly situated of the constitutional rights guaranteed by the First, Fourth, Fifth and Ninth Amendments, *i.e.,* the right to free speech and association, and the right to petition the government for redress of grievances, and the right of privacy.

Appellees assert the constitutional and statutory authority and duty of the President to use such of the Armed Forces as he deems necessary to suppress any insurrection or domestic violence, and point to Defense Department directives regarding the planning for and employment of military resources in the event of civil disturbances, under which one of the responsibilities of the Army is to provide "essential planning, operational and intelligence data to the national military command center and to military service command centers on a timely basis to insure that the national command authorities and appropriate military service command authorities are adequately informed."

For reasons stated hereafter, we find that this court and the District Court have jurisdiction, that there is a justiciable controversy, and that appellants have stated a claim in relation thereto. We therefore remand the case to the District Court for ascertaining essential relevant facts and the determination thereupon of whether any rights of the appellants have been infringed by any actions of the appellees which may be proved.

I. JURISDICTION

Appellants' complaint in the District Court alleged jurisdiction to be based upon the existence of a federal question as contemplated by 28 U.S.C. § 1331 and the requisite $10,000 in controversy. On this appeal [1] the Government contests the allegation of jurisdictional amount, contending that:

There is no evidence in the record that any of

[1] No claim of lack of subject matter jurisdiction was raised in the Government's motion to dismiss in the District Court. This, of course, is no bar to the raising of the issue on appeal. *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908).

the plaintiffs have a claim in fact for any amount of money, much less a claim for an amount in excess of $10,000.

In response to this argument, appellants in essence admit that their claim is not capable of valuation in monetary terms, but argue essentially that where a challenge to a claimed deprivation of fundamental constitutional rights of intangible value is involved, the purposes for the jurisdictional amount requirement[2] are inapplicable and that such requirement should therefore not be applied to defeat federal jurisdiction. While there have been mounting expressions of judicial concern over this seeming gap, caused by the jurisdictional amount requirement, in the power of the federal courts to entertain federal question cases of this nature, we find it unnecessary to reach this question in the instant case.[3]

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[2] The purposes of the jurisdictional amount requirement are, appellants assert, twofold: first, the promotion of federalism by confining federal courts strictly within the limits of their jurisdiction as prescribed by Congress; and, second, the avoidance of consuming the resources of the federal courts in the resolving of "petty" controversies. *See Healy* v. *Ratta*, 292 U.S. 263 (1934), and S. Rep. No. 1830, 85th Cong., 2d Sess. (1958). Neither of these purposes, appellants insist, would be served by denying jurisdiction in the instant case.

[3] *See Wolff* v. *Selective Service Local Board No. 16*, 372 2d 817, 826 (2d Cir. 1967); *Fein* v. *Selective Service System Local Board No. 7*, 430 F. 2d 376, 380 (2d Cir. 1970) (dissenting opinion); *Giancana* v. *Johnson*, 335 F. 2d 366, 371 (7th Cir. 1965) (dissenting opinion); *Murray* v. *Vaughn*, 300 F. Supp. 688 (D.R.I. 1969); *Boyd* v. *Clark*, 287 F. Supp. 561, 567 (S.D.N.Y. 1968) (dissenting opinion). The American Law Institute has recommended the abolition of the amount in controversy requirement in federal question cases precisely because: "The few cases there are * * * that must satisfy the § 1331 requirement are likely to involve matters particularly deserving of a federal forum. * * * Cases in which the plain-

As we recently held in *Peoples* v. *United States Department of Agriculture:*[4]

> The District Court for the District of Columbia has an independent source of jurisdiction in the legislation, passed by Congress, and codified in the District of Columbia Code, 11 D.C. Code § 521, which gives that court general equity jurisdiction, and venue where either party is a resident or found within the District of Columbia. This permits actions for declaratory judgment as well as injunction to be maintained against those whose office in the Federal Government establishes their official residence in the District. *Stark* v. *Wickard,* 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944); *Nestor* v. *Hershey,* 425 F. 2d 504, at 521–523 (Dec. 16, 1969).[5]

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tiff claims violation of his constitutional rights by action of a federal official warrant federal cognizance without the need of demonstrating that the requisite amount is in controversy." ALI, Study of the Division of Jurisdiction Between State and Federal Courts, 172 (1969). *See also* C. WRIGHT, FEDERAL COURTS, § 32 at 110 (1969); Currie, *The Federal Courts and the American Law Institute* (Part II), 36 U. CHI. L. REV. 268, 292 (1969).

[4] 138 U.S. App. D.C. 291, 294, 427 F. 2d 561, 564 (1970).

[5] Where a suit seeks equitable relief, and no claim involving personal property, or for debt or damages is made, the District Court for the District of Columbia has "original jurisdiction" without regard for the amount in controversy. *See Norden* v. *Royall,* 90 F. Supp. 834, 835 (D.D.C. 1949); *Patton* v. *District of Columbia,* 180 A. 2d 844 (D.C. Mun. App. 1962); *Friedman* v. *District of Columbia,* 155 A. 2d 521 (D.C. Mun. App. 1959); Byse & Fiocca, *"Nonstatutory" Judicial Review of Federal Administrative Action,* 81 HARV. L. REV. 308, 325 (1967); 11 D.C. Code §§ 521, 961. Of course, when the District Court entertains such a suit it is exercising powers analogous to those of a state court of general jurisdiction. *Western Urn Mfg. Co.* v. *American Pipe and Steel Corp.,* 109 U.S. App. D.C. 145, 284

Furthermore, we note that since the Government did not contest the existence of the alleged jurisdictional amount in the District Court, appellants had no opportunity to attempt to sustain their allegation that $10,000 was in controversy, an endeavor at which they might well be successful under the doctrine that, particularly where purely injunctive relief is sought, the amount in controversy may be measured by either "the value of the right sought to be gained by the plaintiff * * * [or] the cost [of enforcing that right]

F. 2d 279 (1960); *King* v. *Wall & Beaver Street Corp.*, 79 U.S. App. D.C. 234, 145 F. 2d 377 (1944); *Boardman* v. *Martocchia*, 216 F. Supp. 830 (D.D.C. 1963). And it is unclear whether such a state court would have the power to issue an injunction against a federal officer. *See* Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L. J. 1385 (1964). Nevertheless, it is clear that the reasons creating the doubt as to state courts' power in this respect, stemming from considerations of federal supremacy, do not apply to the District Court for the District of Columbia, which is itself a constitutionally based Article III federal court, albeit one additionally endowed with unique general powers, pursuant to Article I, § 8. *See O'Donoghue* v. *United States*, 289 U.S. 516 (1933).

The foregoing analysis is not affected by the enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358 (29 July 1970) 84 Stat. 473, Title I of which establishes the new Superior Court of the District of Columbia as a court of general jurisdiction equivalent to a state court of similar powers. The instant suit was filed before the 1 February 1971 effective date of the new Act, and therefore properly remains within the jurisdiction of the United States District Court as provided by prior law. District of Columbia Court Reorganization Act of 1970, § 111, 84 Stat. 476, *to be codified as* D.C. CODE ANN. § 11-150(1). *See* Williams, *District of Columbia Court Reorganization, 1970*, 59 GEO. L. J. 483, 540-542 (1971).

to the defendant * * *."[6] In the instant case, it seems likely that if all the relief sought by appellants were granted, including enjoining the operation of the Army's civilian intelligence system and the production and destruction of all records pertaining thereto "maintained by any and all military agencies with-

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[6] *Hedberg* v. *State Farm Mutual Automobile Ins. Co.*, 358 F. 2d 924 (8th Cir. 1965) (Blackmun, J.) (dictum). A succinct and oft-quoted statement of this doctrine was put forth by the 10th Circuit in *Ronzio* v. *Denver & R. G. W. R.R.*, 116 F. 2d 604, 606 (10th Cir. 1940), as follows: "In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." *See Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F. 2d 809 814–16 (8th Cir. 1969). *Compare* C. WRIGHT, FEDERAL COURTS § 34, 117–19 (1969), where the rule allowing the cost to the defendant to be considered is stated to be the "desirable" one, *with* J. MOORE, FEDERAL PRACTICE ¶ 0.91[1] (2d ed. 1964), where the rule is characterized as "contrary" to the prevailing view. While the Supreme Court has never directly passed on this question, *compare St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), *with Horton* v. *Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961), a number of lower federal courts have permitted the cost to the defendant to control the jurisdictional amount issue, *see* cases cited in WRIGHT and MOORE, *supra*. And the Supreme Court's willingness to entertain, without discussion of the jurisdictional basis, the appeal of a federal taxpayer seeking to enjoin the operation of portions of the federal Elementary and Secondary Education Act of 1965 as violating the Establishment and Free Exercise Clauses of the First Amendment, *Flast* v. *Cohen*, 392 U.S. 83 (1968), may well be indicative of the Court's view that jurisdictional amount may appropriately be established from the defendant's viewpoint in certain cases. The Court in *Flast*, in its discussion of the standing issue, noted that "the challenged program involves a substantial expenditure of federal tax funds," 392 U.S. at 103, while nowhere mentioning any alleged monetary value of the plaintiff's claim.

in the United States and overseas," the cost to the Army of complying with such a decree might well exceed $10,000.

Thus even apart from the applicability of 11 D.C. Code § 521, since we have found as detailed subsequently that appellants have otherwise stated an adequate and justiciable claim for relief, we would be constrained to permit appellants on remand the opportunity to meet their burden of satisfying the District Court that the requisite amount is in controversy.[7]

For the foregoing reasons we reject the Government's claim that the dismissal should be affirmed for lack of subject matter jurisdiction.[8]

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[7] *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1935). In establishing that the amounts in controversy exceeds $10,000, "[a]bsolute certainty * * * is not essential. * * * Present probability that [the cost to the defendant] will exceed that sum is enough." *Friedman* v. *International Association of Machinists*, 95 U.S. App. D.C. 128, 220 F. 2d 808 (1955).

[8] Appellants' complaint did not refer to 11 D.C. Code § 521 as a basis for jurisdiction of their claim. However, at argument, appellants moved pursuant to 28 U.S.C. § 1653 to amend their complaint to include § 521 in their jurisdictional allegations. Section 1653 provides as follows: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Under this section, "either this Court or the District Court on remand, has power to permit amendment to avoid dismissal under jurisdictional grounds." *Jones* v. *Freeman*, 400 F. 2d 383, 387 (8th Cir. 1968). The statute is to be construed liberally in accordance with the congressional intent to provide a means of avoiding the dismissal of suits on technical grounds. *John Birch Society* v. *National Broadcasting Co.*, 377 F. 2d 194 (2d Cir. 1967); *Moore* v. *Coats Co.*, 270 F. 2d 410 (3rd Cir. 1959). Accordingly, we direct that upon remand of this action appellants be permitted to amend their complaint to allege jurisdiction resting upon 11 D.C. Code § 521.

II. JUSTICIABLE CONTROVERSY

In recent years the Army and the National Guard have been called upon to act to preserve domestic peace against violent protests leading to civil disorders, a role for the military which was not unforeseen in our Constitution.* Many violent protests were aimed directly at military functions and installations themselves, as in ransacking Selective Service offices, barring troop and supply trains by prostrate bodies on the tracks, unlawful attempts to enter military bases or demonstrations thereon, and harassment of defense-oriented business. In executing other missions the Army confronted riotous mobs protesting matters unrelated to military operations, for example, the tragic riots in Detroit, Newark, and other of our large cities. During the period 1967–68 the National Guard was called upon eighty-three times and the Army four times to quell cases of civil disorder.

While these statistics relate to the period of civil disorders during which the Army operated the intelligence system which appellants complain violated their rights, we also note that in the period beginning with the use of the Army paratroops at Little Rock in 1957 the Army has been called upon under related constitutional and statutory provisions to preserve civil peace in order that certain groups might exercise their constitutional rights. The moral of this is that no matter who the persons or groups are giving voice to their protests against the established order, civil disturbance of one kind or another is likely to ensue; and,

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*U.S. Const. art. I, § 8, cl. 14, 15, 16; art. II, § 2, cl. 1; art. 4, § 4. Article I, § 8 assigns the Power to Congress to define the role of the military in national affairs. The military must therefore confine its activities to those necessary to carry out its functions provided by statute.

irrespective of the content or cause of the protest, the military need certain intelligence information to perform their mission "to enforce the laws of the United States" or "suppress * * * insurrection."[10]

In performing this type function the army is essentially a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman.

No logical argument can be made for compelling the military to use *blind* force. When force is employed it should be intelligently directed, and this depends upon having reliable information—in time. As Chief Justice John Marshall said of Washington, "A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information; * * *."[11] So we take it as undeniable that the military, *i.e.*, the Army, need a certain amount of information in order to perform their con-

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[10] 10 U.S.C. §§ 331, 332, 333 (1964). We note, however, that the operation of the intelligence system challenged herein is not sought to be justified by any need to obtain information for the use of the National Guard. At oral argument appellees admitted that no such information has been provided to the Guard on the occasions of its deployment during 1967–68, and would not be provided unless the Guard were called into federal service. With respect to the use of the Guard in Federal service, article 1, § 8, cl. 15 of the Constitution empowers Congress "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

[11] Foreword, U.S. Army Basic Field Manual, Vol. X, circa 1938.

stitutional and statutory missions.[12] The questions are what type of information the military need, how they should go about obtaining it, when they need it, and whether what the Army has done here has infringed any of appellants' rights.

So much for the military's mission and intelligence necessity. As for appellants' contention that their rights, constitutional or otherwise, have been infringed, they have some difficulty in establishing visible injury, at least on this incomplete record. Appellants freely admit that they complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies. There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.

Thus the instant case, at this juncture, involves no concrete, identifiable sanctions, no compelled self-identification (except to the extent that the Army may attend meetings thought to be for a faithful few), and no threat of publication. Turning to the authorities claimed to be relevant here, virtually all of the First

[12] The President's National Advisory Commission on Civil Disorders recommended:

"Intelligence—The absence of accurate information both before and during a disorder has created special control problems for police. Police departments must develop means to obtain adequate intelligence for planning purposes, as well as on-the-scene information for use in police operations during a disorder."

Amendment cases cited where government activity was enjoined or struck down fall into one of three categories:

(1) Cases where some legal or criminal sanction was imposed or threatened to be imposed on persons who exercised their First Amendment rights.[13]

(2) Cases involving some element of government compulsion, either to testify regarding one's political ideas or beliefs, or to identify oneself in order to exercise First Amendment rights.[14]

(3) Situations where the Government threatens to publicize the names of allegedly politically controversial persons for the purpose of inhibiting the exercise of their first Amendment rights.[15]

In view of the distinctions in this case from prior decisions, appellees argue that no justiciable controversy exists, *i.e.*, that nothing has been done, that nothing is contemplated to be done, and even if some action by the Army against appellants were possibly foreseeable, such would not present a presently justiciable controversy.

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[13] *E.g. United States* v. *Robel*, 389 U.S. 258 (1967) (criminal prosecution or loss of employment); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) (criminal prosecution); *NAACP* v. *Button*, 371 U.S. 415 (1963) (criminal prosecution, disbarment); *National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 412 F. 2d 1103 (1969) (draft reclassification).

[14] *E.g.*, *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965) (compelling affirmative act of requesting delivery of mail thought by the Post Office to be communist propaganda); *Talley* v. *California*, 362 U.S. 60 (1960) (requiring identity on political handbill); *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (requiring filing of membership lists); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), and *Watkins* v. *United States*, 354 U.S. 178 (1957) (compelling testimony).

[15] *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970).

This position of the appellees does not accord full measure to the rather unique argument advanced by appellants. While appellants do indeed argue that in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to the detriment of these civilian appellants, yet appellants do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, appellants contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on appellants and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech, etc. The baleful effect, if there is one, is thus a present inhibition of lawful behavior and of First Amendment rights.[16]

Under this view of appellants' allegations, under justiciability standards[17] it is the operation of the

[16] "The peculiar feature of suits alleging a First Amendment chilling effect . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interest if he *does not* speak or act as he says he wants to." *National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 64, 412 F.2d 1103, 1111 (1969). If the Army's intelligence system causes such injury it may be enjoined if the system in operation exceeds the authority granted by Congress, *see Kent* v. *Dulles*, 357 U.S. 116 (1958) and notes 9 and 10, *supra*, or, if within its statutory authority, it nevertheless creates more than an "incidental" burden on First Amendment Rights, and thus violates the Constitution. *See United States* v. *O'Brien*, 391 U.S. 376 (1968).

[17] To "allege the sort of 'case' or 'controversy' referred to in Article III of the Constitution, the source of jurisdiction of the federal courts, * * * the complaint must show that there exists a controversy between the parties with such immediacy and presently adversary character as to require its adjudica-

system itself which is the breach of the Army's duty tion." *Davis* v. *Ichord*, No. 23,426 (D.C. Cir. 20 Aug. 1970).

To the extent that the Army's argument against justiciability here includes the claim that appellants lack standing to bring this action, we cannot agree. If the Army's system does indeed derogate First Amendment values, the appellants are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all of the appellants and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records. Since this is precisely the injury of which appellants complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine, on the issue of whether the actions complained of do in fact inhibit the exercise of First Amendment rights. Nor should the fact that these particular persons are sufficiently uninhibited to bring this suit be any ground for objecting to their standing. *See N.A.A.C.P. v. Alabama* 357 U.S. 449, 459 (1958): *Anderson* v. *Sills*, 56 N.J. 210, 265 A. 2d 678, 684 (1970).

Nor does the recent group of Supreme Court decisions limiting the situations in which federal courts may enjoin court criminal proceedings require a different result. *See Younger* v. *Harris*, —— U.S. —— (1971) (39 U.S.L.W. 4201), *Boyle* v. *Landry*, —— U.S. —— (1971) (39 U.S.L.W. 4207) (23 Feb. 1971), and related cases decided the same day. Those cases rest firmly on concepts of Federalism and comity not present in the instant appeal. In *Younger* where certain of the plaintiffs sought standing to attack alleged unconstitutional state statutes on First Amendment grounds, because they claimed to "feel inhibited" by the existence of such laws, the Court stated:

"We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to *enjoin a pending state prosecution*. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs *in such cases*." (Emphasis added.)

The Court went on to hold that even one who has been

toward appellants and other civilians.[18] The case is therefore ripe for adjudication. Because the evil alleged in the Army in intelligence system is that of

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indicted under a constitutionally suspect state law may not ordinarily seek federal injunctive relief because of the "long standing public policy against federal court interference with state court proceedings * * *." And in *Boyle*, where "[n]ot a single one of the citizens who brought [the] action had ever been prosecuted, charged, or even arrested under the particular * * * statute which the court below held unconstitutional," the Supreme Court relied on its discussion of the requirements of Federalism in *Younger* to conclude that: "the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. *The policy of a century and a half against interference by the federal courts with state law enforcement* is not to be set aside on such flimsey allegations as those relied upon here." (Emphasis added.)

Aside from the fact that, as we have related *supra*, appellants here complain of present injury and not merely speculative future injury, we are not faced in this case with any considerations similar to the policy against federal interference in state court actions which the Supreme Court found controlling in *Younger* and *Boyle*. Furthermore, and highly important here, appellants do not have the "adequate remedy at law" available to the plaintiffs in *Younger* and *Boyle*, in the form of the opportunity to present their constitutional claims to the state court, which the Supreme Court also relied on as a basis for restricting the exercise of federal equitable jurisdiction in such cases.

[18] The analysis of justiciability questions in terms of whether there has been a breach of a judicially identifiable "duty" stems from the Supreme Court's discussion in *Baker* v. *Carr*, 369 U.S. 186, 198 (1962), and *Powell* v. *McCormack*, 395 U.S. 486, 517 (1969). In the latter case the Court, quoting in part from *Baker*, said: "In deciding whether a claim is justiciable, a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" The Army has both a duty not to exceed its statu-

overbreadth, *i.e.*, the collection of information not reasonably relevant to the Army's mission to suppress

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tory authority and not to infringe first Amendment rights. Appellants claim the Army is doing both; their claim is therefore now justicable, since "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant" judicial resolution. *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969), quoting from *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U.S. 270, 273 (1941). That the Army has a legitimate need for certain information need not be denied. The claim here is that in the operation of its intelligence system the Army has gone beyond any legitimate need for information, and in doing so has created a present chilling effect on the "transcendent" values enshrined in the First Amendment. *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). *See* note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 809 (1969) for a discussion of the "substantive" significance of the chilling effect doctrine as relied upon by appellants here. The "judicial determination" of this alleged breach of duty is attainable by identifying those areas in which the Army's activity goes beyond that reasonably relevant to its statutory mission requirements, assuming, of course, that limitation of the Army's system to the extent found reasonably relevant to its civil disorder mission would not itself represent a significant intrusion into the protected First Amendment area. *Cf. United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). That this latter assumption is likely to be valid is seen from documents in this record indicating that the Army may have modified its policy and now views its information requirements as limited to "reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control." Letter from Under Secretary of the Army Thaddeus R. Beal to Senator Sam J. Ervin, 20 March 1970 (App. 84, 88). In spite of this recent self-limitation, however, appellants have alleged the actual operation of a system of much broader scope and, further, that previously collected information is still retained in various Army files. We therefore think that the appellants should be allowed to develop fully their contention that the Army collects and maintains information on

civil disorder,[19] and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time.

Only recently this court decided *Davis* v. *Ichord,* in which an attack was made on the maintenance and potential use of files on political dissenters by the House Internal Security Committee. This court there held that no case or controversy was presented because the appellants had failed to establish standing to attack the present use of the files and did not show any concrete indication that the Committee's files would be used against anyone in the future. Nevertheless, this court in *Davis* did indicate that "among the considerations pertinent to determining the existence of a chilling effect upon the exercise of First Amendment rights which give rise to a case or controversy are the *source of the chill,* the extent to which it focuses upon the conduct of those who allege it, and the likelihood that it will affect that conduct." The court in *Davis* was concerned with the "source of the chill" in order to determine whether the threat of *future* injury was sufficiently substantial to provide the necessary ripeness to the controversy.

Nevertheless, in view of this country's long-established tradition against military involvement in civilian politics, we think it significant that here the "source of the chill" is the Army, as opposed to the

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civilian political activity in excess of its mission requirements, and the Army should have the opportunity to show the relevance of its intelligence data to its civil disorder mission.

[19] "The free exercise of First Amendment rights is perhaps more readily inhibited by a [policy] justifiably suspect as vague or overbroad, because of the uncertainty of its application. * * *" *Davis* v. *Ichord*, No. 23,426 (D.C. Cir. 20 Aug. 1970) (slip op., at 14).

situation in *Davis* where the House Committee could point to a legal basis for the collection of such files pursuant to its designated function to investigate propaganda. We think the Army has a legal basis for the collection of intelligence information relevant to its constitutional and statutory mission, but on the record before us we cannot say that the intelligence system as designed and operated does not go beyond that which would be justified by the Army's mission. The Army system here is apparently of a much broader scope than the files involved in *Davis*, and we held in *National Student Association* v. *Hershey*[20] that "the severity and scope of the alleged chilling effect on First Amendment freedoms" is a factor to be considered in determining justiciability. It is arguable that the existence of a system with the broad scope as alleged by appellants would affect the conduct of persons in the class that appellants claim to represent.[21]

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[20] 134 U.S.App.D.C. 56, 68, 412 F.2d 1103, 1115 (1969).

[21] The dissent suggests that the instant suit may not be appropriate for treatment as a class action under Rule 23, Fed. R. Civ. P. While we recognize that the nature of the appellants' claims and the potentially large number of persons they propose to represent pose difficult questions as to the amendability of their claims to Rule 23 treatment, this question was not considered by the trial court, has not been argued by the parties, and is not presented in the instant appeal. We therefore do not pass on it here. On remand, the trial court will have the opportunity, illuminated by the arguments of the parties, to determine to what extent the class treatment of appellants' claims is appropriate. In this connection we note the considerable flexibility afforded the trial judge under Rule 23 to treat the suit as a partial class action (Rule 23(c)(4)(A)), establish subclasses (Rule 23(c)(4)(B)), and to defer final decision on class action issues until after discovery or further development of the factual bases for the claims alleged. *See* 3B J. MOORE, FEDERAL PRACTICE, ¶ 23.45[1] at 23–707 (1969). This latter course would seem particularly appropriate

Referring to our holding in *Davis* that the "source of the chill" is important in determining whether there is any inhibiting effect on the exercise of First Amendment rights, we think that there is a significant difference between investigative actions taken by a military agency in reference to civilians and similar investigative actions taken by a regular investigative agency of a civilian branch of the Government."[22]

One of the functions of a civilian investigative agency, such as the Federal Bureau of Investigation, is to compile information on law violators, agitators of violence, and possible subversives. It has always

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here, where because of the very nature of the system alleged to be the cause of the complained of injury, the full facts with respect to the scope of its operation and the numbers of persons affected thereby, are, at the present state of the proceedings, primarily within the exclusive knowledge of the defendants.

We further note, in response to the concerns expressed by the dissent, that the fact that a proposed class contains a great number of members does not itself necessarily preclude class action treatment, *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968), nor, in suits seeking injunctive or declaratory relief, is the court necessarily required to look into the particular circumstances of each member of the proposed class in determining whether class action treatment is appropriate. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 937 (2d Cir. 1968).

[22] On oral argument counsel for appellants admitted that there is a material difference in the impact of the same intelligence gathering and distribution, depending on whether it is performed by the military or by civilian investigative agencies such as the FBI. Counsel was unwilling to concede that, as to content, any of the information complained of could be compiled by either type agency, not even to the extent of compiling a list of previously convicted fomenters of civil disturbance; and as to time, counsel asserted that such information as was compiled should be given on the spot to the military force by a civilian agency. So extreme a limitation on the gathering and timely dissemination of any information would render it useless.

been recognized that this is a delicate function, and it is exercised under the direction of the Attorney General. Investigation is performed by men a majority of whom are lawyers or who have had considerable legal training, under the direction of lawyers in the Justice Department, and the information compiled is only usable and effective through court action. The FBI is powerless to imprison anyone or to affect his liberty in any way except through the action of the courts.

The Army or other military, in contrast, are not concerned with law violations. And, in sharp distinction to the FBI and other investigative agencies, they definitely command their own force to exercise at the will of their own commanders. The military are not accustomed to effecting their will through courts and legal processes. Indeed, the employment of military personnel in civil disorders itself implies at least a partial breakdown of law and order, a breakdown of normal processes of law through courts.

The compilation of data by a civilian investigative agency is thus not the threat to civil liberties or the deterrent on the exercise of the constitutional right of free speech that such action by the military is, because a civil investigative agency has no inherent power to act against an individual, that power always being subject to the well-defined restrictions of law and the approval of the courts. The military have no such restrictions; they have their own force (of incomparable power), they have their own commanders trained as soldiers, not lawyers, the military's vast size may make civilian control of individual or small unit actions more theoretical than actual, and the military is not accustomed to operating within the restrictions of law and the processes of courts."

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[23] *Cf. National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 71, 412 F. 2d 1103, 1118 (1969), where, in a suit

It is highly important for the safety of the country that to the extent consonant with the performance of the military's mission a separation of sensitive information and military power be maintained, as a separation of match and powder. In an emergency or anticipation of an emergency the military power can be supplied the necessary information from civilian investigative agencies; these two ingredients, potentially dangerous when combined, can be put together by a responsible President and his Cabinet officers as the emergency demands. But to permit the military to exercise a totally unrestricted investigative function in regard to civilians, divorced from the normal restrictions of legal process and the courts, and necessarily coupling sensitive information with military power, could create a dangerous situation in the Republic.

The appellants have not had an opportunity to establish (and may never establish) their far-sweeping claims as to the character of the information gathered and the operation of the system established by the Army. We were informed by appellees' counsel on oral argument that on 6 March 1970 the Secretary of the Army by directive to the Chief of Staff limited the intelligence activities here complained of and directed the personnel responsible to concentrate on

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challenging a Selective Service policy as inhibitive of First Amendment rights we said:

"It is no reflection on the competence or integrity of selective service personnel to observe that they are ill-equipped to determine questions of law as delicate and complex as those commonly raised by anti-war protest activity. Draft boards do not employ judicial procedures, and their members often have no legal training. Rightly or not, registrants are also likely to have less confidence in the constitutional sensitivity of their draft board, especially in the area of war dissent, than in that of the prosecutor and the courts."

the more important and likely sources and locales of violence. Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. If the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights. Appellants have, therefore, stated a claim upon which relief can be granted.

III. REMAND

Having found that this court and the District Court have jurisdiction, that a justiciable controversy exists, and that appellants have stated a claim upon which relief could be granted, we think the record now before us is much too incomplete for a court to determine the ultimate questions of whether the Army has infringed any rights of the appellants and whether appellants are entitled to any injunctive relief. We therefore remand the case to the District Court for the determination of the following principal (and any related) points:

1. The nature of the Army domestic intelligence system made the subject of appellants' complaint, specifically the extent of the system, the methods of gathering the information, its content and substance, the methods of retention and distribution, and the recipients of the information.

2. What part, if any, of the Army domestic intelligence gathering system is unrelated to or not reasonably necessary to the performance of the mission as

defined by the Constitution, statutes, military regulations, and as interpreted by actions under those written definitions of the mission.[24]

3. Whether the existence of any overbroad aspects of the intelligence gathering system, as determined above, has or might have an inhibiting effect on appellants or others similarly situated.

4. Such relief as called for in accordance with the above established law and facts.

Reversed and Remanded.

MACKINNON, *Circuit Judge,* concurring in part and dissenting in part: While I concur in many of the

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[24] *Cf. Anderson* v. *Sills*, 56 N.J. 210, 265 A. 2d 678, 689 (1970), where the New Jersey Supreme Court reversed a lower court decision enjoining the statewide operation of a civil disorder intelligence system by the New Jersey State Police. The court there held that the operation of the intelligence system was at least partly pursuant to a valid governmental interest and should not have been enjoined by the trial court in a summary judgment proceeding. Rather, the court held that a full hearing should be conducted to determine whether the scope of the challenged intelligence system was overbroad in view of both the legitimate state interest in collecting information for planning for and preventing civil disorders and the possible burden on the exercise of First Amendment freedoms involved. With regard to its remand order, the court stated: "In short, if it should be found that the police are gathering information which they could not reasonably believe to be relevant to the police function . . . and that circumstances warrant judicial intervention on that account, the injunctive order must be precisely limited to the offending material or practice. The order must not interfere with police activity that is proper, either in direct terms or because of the vagueness of the restraint." A similar evaluation must be made in the instant case, with due account given to the differences in function and role between the police and the Army, in dealing with and seeking to prevent civil disorder, and relief, if any, should be appropriately tailored so as not to interfere with legitimate Army activity.

pronouncements in the majority opinion I respectfully dissent from the result. My opinion is based on the facts of the case which emerge from the pleadings, affidavits and the admissions made to the trial court. In the hearing before the trial judge, counsel admitted that in the facts upon which they based their complaint the named plaintiffs were not aggrieved by the acts of the appellees:

> Our Plaintiffs this morning, for example, are *not people, obviously, who are cowed and chilled;* they've come into Court, but they have to represent millions of Americans not nearly as forward, as courageous, as willing as them to open themselves up to public investigation and public scrutiny. We're not—you know, every citizen is not a Tom Payne; they're few and far between.

Tr. 17 (emphasis added).

This admission that the governmental activities they attack did not cause any substantial infringement of their constitutional rights constitutes a basic denial of practically their whole case. There still remains the allegation that the existence of the files and information operates to deny them their constitutional right of association with others who are chilled, but the chill to this amorphous group in turn is grounded in the unrealistic and speculative fear that the Government will improperly use the information against them.[1]

[1] As the majority points out, appellants vigorously assert that they are not here attacking the legality of the many uses the Army might make of the information it is presently gathering; they are not basing their complaint on the possibility of future injury. Rather they assert that the present inhibitory effect of the Army's surveillance system is the only injury about which they complain; the nature of the sanctions which might be imposed on them at some future time are to them here irrelevant.

To my mind, this attempted distinction is untenable. Any

The critical information relates to reports of public activities of individuals who *publicly* participate in gatherings and demonstrations which tend to civil disorders and in related activities.[2] Appellees gathered this information from public sources and open meetings in much the same manner that newspapers cull information. However, there is one difference, *i.e.*, the newspapers publish much of the information they obtain, whereas the Army merely retains it for possible use by it in the future and this may not necessarily include any publication of the information. Such information is intended to be used to help suppress civil

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present inhibition which they suffer must be based wholly on a fear, specific or general, of future consequences stemming from use of the Army's information. At the same time, they have alleged no present use, preparation for use or selectivity in gathering information by the Army which would reasonably justify such fears. This is not a situation comparable to the one facing the Court in Lamont v. Postmaster General 381 U.S. 501 (1965), where, in order to receive certain mail, a person was required to tell the Government that he desired to receive "communist propaganda" or in Shelton v. Tucker, 364 U.S. 479, 486 & n.7 (1960) where there was a realistic fear that information gathered from individuals would be misused. Any inhibition which appellants in this case suffer is attributable, not to what the Army is presently doing, but to their own imagination as to what it might do at some unknown time in the future. Therefore it is inaccurate to contend that the Army's present surveillance activity is the source of the inhibitions which appellants allege. *Compare Bee See Books, Inc.* v. *Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968).

[2] There are no allegations that the Army has conducted surveillance of wholly private activity and at oral argument appellants indicated, in effect, that they did not have any witnesses who would testify that the Army had engaged in such activity. *Compare* Local 309, United Furniture Workers of America v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948).

disorders in the event the military are called out in conformance with statute[3] for that purpose. Other obvious proper uses by the Army for such information

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[3] Statutory authority for the Army's activity in relation to civil disorders is contained in 10 U.S.C. §§ 331–33 (1964):

"Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection."

10 U.S.C. § 331.

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

10 U.S.C. § 332.

"The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

"(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

"(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

"In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

10 U.S.C. § 333.

may be judicially noticed from public incidents of the period and would include helping prevent and solve crimes involving destruction, threat of destruction, or theft of military draft records, military supplies, military research and other Government property and facilities at draft centers, armories, military bases, forts, arsenals, military training centers and military suppliers and research centers operating under military contract.

In the instant complaint there are no allegations or claims that any of the information gathered by the Army has been used in a manner that has injured plaintiffs or imposed on them any penalty attributable to their exercise of their First Amendment rights. In fact, appellants acknowledge in their brief that the uses to which the collected information might be put by the Army are *unknown:*

> In the case at bar there is something more subtle at stake than the threat of prosecution and criminal sanctions present in *Dombrowski, supra.* There is a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the defendants' civilian intelligence network. *This creates a substantial chilling effect upon the free and uninhibited exercise of First Amendment rights.*

(Emphasis added) (App. br. p. 40).

Such indefinite and abstract assertions of amorphous fears do not present a case involving facts of a concrete nature. Appellants' admission, *supra,* that the "threat" of which they complain is "unknown," as the latter word is used by appellants, means that the threat is

> "Not knowable * * * cannot be comprehended * * * beyond the limits of human experience, or of human powers of apprehension or understanding."

Webster's International Dictionary (2d ed.)

Such indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding, do not present a case involving facts of sufficient realism and definiteness to confer jurisdiction on the court to make a sweeping constitutional decision affecting important activities of the federal Government. There is nothing more here than a highly abstract claim based on an imaginary fear that governmental power to collect information for a valid purpose will be misused for an *improper* purpose. Similar fears might exist with respect to any governmental power. All power is susceptible of misuse, but that truism when coupled with unfounded fear alone is not sufficient to make out a case for judicial jurisdiction. What is necessary before a court is authorized to assume jurisdiction is some allegation from which it can be concluded that the apprehension of the misuse of governmental power is a realistic possibility. Because of the absence of any such allegation here it is my view that a proper case or controversy does not exist. *Davis* v. *Ichord,* —— U.S. App. D.C. ——, —— F. 2d ——, (Nos. 23426 & 23427, Aug. 20, 1970); *Golden* v. *Zwickler,* 394 U.S. 103, 108, 110 (1969).

Since the claim of the named plaintiffs does not present a case or controversy, nothing is added by the fact that it has been framed as a class action. *Davis* v. *Ichord, supra,* slip op. at 16 n. 19. *See generally* 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 567 at 308 (Wright rev. 1961); 3 J. MOORE, FEDERAL PRACTICE ¶ 24.04 (1969). As Judge Johnsen remarked in *Kansas City, Mo.* v. *Williams,* 205 F. 2d 47, 51 (8th Cir.), *cert. denied,* 346 U.S. 826 (1953):

> It its of course necessary generally that a

> plaintiff be able to show injury to himself in order to entitle him to seek judicial relief. He cannot be a mere volunteer and ask judicial intervention simply "because someone else may be hurt," but he "must present facts sufficient to show that his individual need requires the remedy for which he asks." *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 162, 164, 35 S. Ct. 69, 71, 59 L. Ed. 169.

Moreover, even if I were to agree with the majority that appellants' claim was ripe, I would seriously question whether the action was an appropriate class action. When one considers the great number of people that the named plaintiffs seek to represent, their highly varied backgrounds and activities, and that it is the constitutional right of the individual that is sought to be protected, it is obvious that a great many highly individualized questions would be presented. The record of each protestor, and each protest activity, might have to be considered separately and might necessarily result in different determinations as to whether the Army was justified in making a record of his public activities for possible future reference. Under such circumstances there is a serious question whether the complaint presents "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2).[4] *See generally Green* v. *Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). The importance of this requirement is heightened by recog-

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[4] FED. R. CIV. P. 23(a) provides:

"*Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

nition of the vast numbers of people appellants seek to have rise *or fall* on the strength of the showing they make in this suit. *See* FED. R. CIV. P. 23(c)(3).

It should also be noted that it is Congress that is empowered by the Constitution "to make rules for the Government and regulation of the land and Naval forces" (U.S. CONST. Art. I, § 8, cl. 14) and judicial notice may be taken that Congress is presently conducting public hearings upon the policy questions involved in this very area where the named plaintiffs here seek judicial intrusion.[5]

Finally, the trial court here concluded:

> The Court holds that what in effect the plaintiffs are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in

[5] 117 CONG. REC. S. 985 (daily ed., February 8, 1971) reports the announcement by Senator Ervin that the Senate Judiciary Subcommittee on Constitutional Rights had scheduled hearings on Computers, Data Banks and the Bill of Rights. On September 8, 1970, Senator Ervin outlined the purpose and scope of the study. In this regard, it is well to note that the issues appellants seek to have litigated in this suit are tremendously complex, involving broad questions of both law and policy. Recognition of this complexity, recognition of the fact that courts generally become less and less able to deal competently with controversies the farther removed they are from the "impact of actuality" and recognition of the "legitimating function" of a judicial decree, *see* A. BICKEL, THE LEAST DANGEROUS BRANCH 30–31 (1962), all counsel against finding the present controversy ripe too early. In my view, resolution of the issues presented by appellants is much better undertaken, at this juncture, by the Congress than it is by this court.

> this country and magazines, [6] and the Court holds that they state no cause of action; they show no unconstitutional action on the part of the Army; they show no threats to their rights. And I will sustain the motion to dismiss and I will deny the preliminary injunction * * *.

It is my view that we should affirm the action of the trial court and wait until a case appears involving some person who alleges a more tangible basis for the claimed threat to his rights. Certainly since these investigative activities began in 1965, if they were the great peril to the populace that appellants argue, there must be one individual who can be found to complain of an injury caused by a concrete threat of the *actual misuse* of such information. To the extent indicated above, I respectfully dissent.

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[6] There was a great deal of material in which the Army had an obviously legitimate interest stemming from the following factual situation, as outlined in the brief of appellee: "[O]ur Nation, during the Summer of 1967, witnessed the tragic riots in Detroit and Newark and, for the first time in 25 years, the Army was called in to assist the local civilian authorities in quelling the Detroit disturbances. During the period 1967–68, the National Guard was called upon 83 times and the Army four times to quell cases of civil disorder. The March on the Pentagon, the disturbances at the Democratic Convention, and the rioting in the Nation's Capital, which left large areas of the City leveled, all required the use of the armed forces to bring order out of the chaos. It has been reported that during the month of April 1968 alone, there were 237 civil disorders, 27,000 arrests, 43 deaths, over 58 million dollars in property damages, and over 58,000 National Guard and Army troops had to be used 25 times to quell the civil disturbances. *U.S. News and World Report*, September 2, 1968. See also the Brandeis University Lemberg Center for Study of Violence Reports; *Disorders—1968*, by the General Adjustment Bureau, Inc.; *Riot and/or Civil Commotion Report* by the American Insurance Association."

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 24203

Civil Action 459–70—September Term, 1970

ARLO TATUM, CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, ET AL., APPELLANTS

v.

MELVIN B. LAIRD, SECRETARY OF DEFENSE, ET AL.

Filed April 27, 1971

Appeal From the United States District Court for the District of Columbia.

Before: TAMM, MACKINNON and WILKEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and this case is hereby remanded to the District Court for

further proceeding consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

NATHAN J. PAULSON,
Clerk.

Dated: April 27, 1971.

Opinion filed by Circuit Judge Wilkey.

Opinion filed by Circuit Judge MacKinnon, concurring in part and dissenting in part.

APPENDIX C

COURT'S FINDING OF FACTS AND CONCLUSIONS OF LAW

THE COURT: The Court holds that what in effect the plaintiffs are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in this country and magazines, and the Court holds that they state no cause of action; they show no unconstitutional action on the part of the Army; they show no threats to their rights. And I will sustain the motion to dismiss and I will deny the preliminary injunction, it following, of course, if it's acceptable to the motion to dismiss, that the great likelihood of plaintiffs maintaining this action is in the view of the Court zeroed. So I will deny the preliminary injunction and grant the motion to dismiss.

Present an order.

Mr. MABONEY: Yes, your Honor.

ORDER

This cause having come before the Court on April 22, 1970 on plaintiffs' motion for a preliminary injunction, on defendants' opposition thereto and on defendants' motion to dismiss the complaint filed herein on February 17, 1970, and the Court having considered the pleadings, briefs, and affidavits filed herein, and having heard the oral argument of counsel for the respective parties, and it appearing to the

Court that plaintiffs fail to state a claim upon which relief can be granted, show no unconstitutional action and allege no unlawful action on the part of the defendants, show no threats to their rights and present no justicable controversy, and it further appearing to the Court that the defendants' motion to dismiss the complaint should be granted, it is, therefore, by the Court this 29th day of April 1970;

ORDERED, that the defendants' motion to dismiss be, and the same hereby is, granted and that the action be, and the same hereby is, dismissed with prejudice; and it is

FURTHER ORDERED that plaintiffs' motion for a preliminary injunction be, and the same hereby is, denied as moot.

United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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S. ROBERT SEITZ

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN B. LAIRD, SECRETARY OF DEFENSE, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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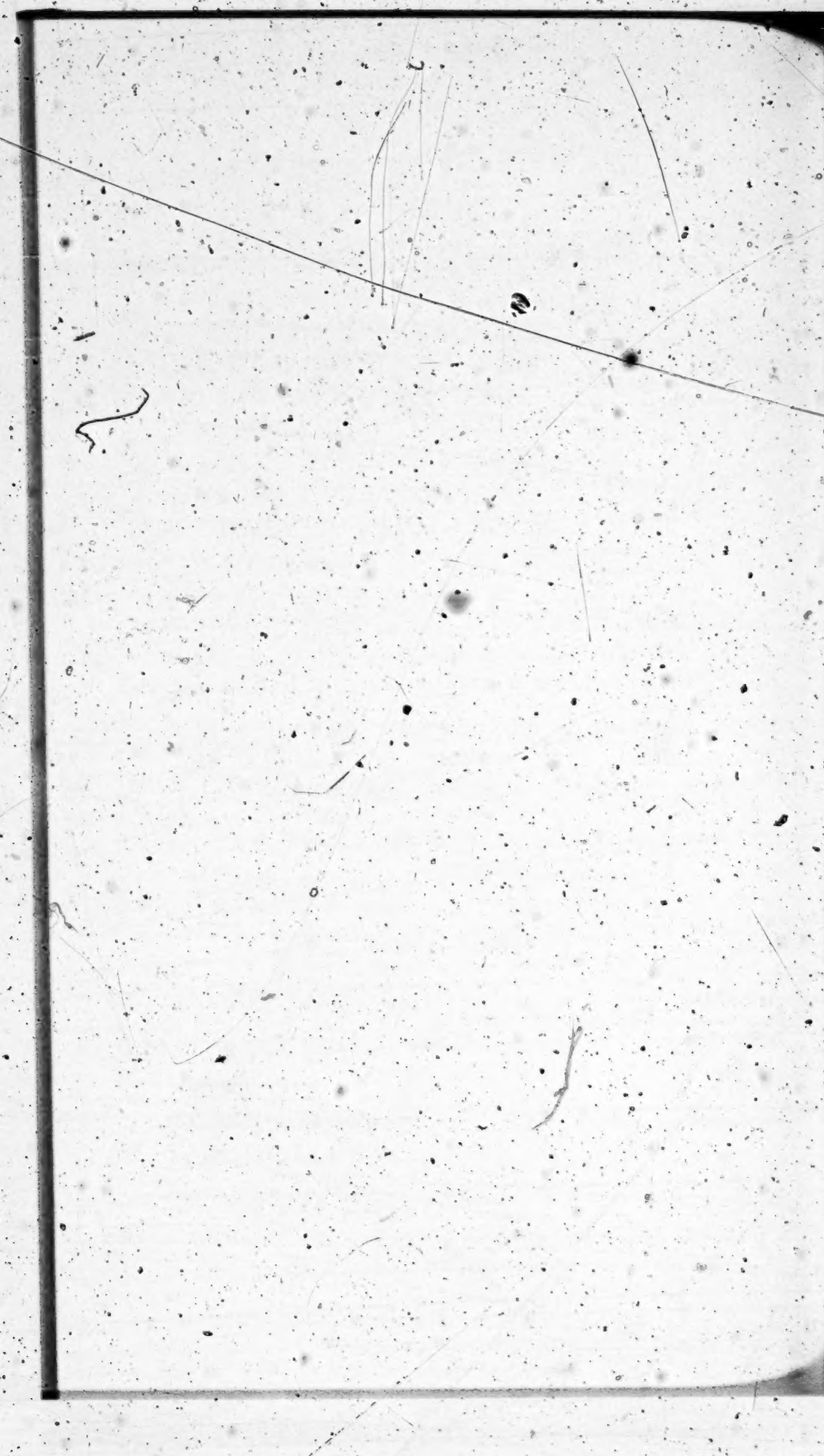

In the

Supreme Court of the United States

October Term, 1971

No. 71-288

Melvin B. Laird, Secretary of Defense, *et al.*,

Petitioners,

—v.—

Arlo Tatum, *et al.*

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Plaintiffs Arlo Tatum, *et al.*, by their attorneys, oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, Petition for Certiorari)[1] is reported at 444 F.2d 947 (D.C. Cir. 1971). The opinion of the district court (App. C, Petition for Certiorari) is not reported.

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[1] All citations hereinafter to the opinion below are to Appendix A to the Petition for Certiorari.

Jurisdiction

The judgment of the court of appeals was entered on April 27, 1971. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to August 25, 1971. The Clerk of the Supreme Court extended the time for filing a brief in opposition to a writ of certiorari until October 15, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the lack of finality of the judgment below, remanding the case to the district court for a factual determination of the constitutional issues presented, requires that the petition for a writ of certiorari be denied at this premature stage of the litigation.

2. Whether the court of appeals was correct in holding that plaintiffs' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity places an unconstitutional burden on plaintiffs' exercise of their First Amendment rights—was justiciable under Article III and that plaintiffs had standing to sue.

Statement of the Case

The petitioners' Statement of the Case neglects to mention the facts in this case. The facts, insofar as they are known at this stage of the proceedings, are central to the question whether certiorari should be granted. We therefore set them out in some detail.

On February 17, 1970, plaintiffs,[2] on behalf of themselves and others similarly situated, instituted this action challenging the constitutionality of the surveillance of lawful civilian political activity by the United States Army. Their complaint alleged that the Army's intelligence operations in the civilian community are unauthorized and unnecessary, inhibit political participation and debate by civilians, and deprive plaintiffs and others similarly situated of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy, guaranteed by the First, Fourth, and Ninth Amendments to the Constitution.

1. Proceedings in the Courts Below.

Plaintiffs filed a motion for a temporary restraining order and preliminary injunction on March 12, 1970, requiring the defendants to discontinue the surveillance complained of and to deliver to the court *in camera* copies of all domestic intelligence records which the defendants claimed to have ordered destroyed. The application for a restraining order was denied on March 13, 1970. On April 22, 1970 plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction. The court, however, denied plaintiffs' request to proceed with evidence and witnesses and their motion for a preliminary injunction, and granted the defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Plaintiffs appealed the dismissal and on April 27, 1971 the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey in which he was joined by Judge Tamm, reversed

[2] Respondents are referred to as plaintiffs throughout this brief.

and remanded the case to the district court for full evidentiary proceedings to determine: (1) the nature of the Army domestic intelligence system; (2) what part of the Army domestic intelligence system is unrelated to or not reasonably necessary to the performance of the Army's statutory and constitutional mission; (3) whether the existence of any overbroad aspects of the system has or might have an inhibiting effect on the plaintiffs and others similarly situated; and (4) what relief is called for in accordance with the evidence.

2. Facts in the Summary Record Made in the District Court.[3]

This case is here solely on motion papers. The complaint and the affidavits and exhibits in support of plaintiffs' motion for a preliminary injunction state that the plaintiffs are citizens and organizations whose constitutionally protected political activity has been the subject of direct and indirect, overt and covert surveillance by intelligence agents and intelligence units of the United States Army. The nature of this surveillance, and the way in which it encompasses the political and social activities of the plaintiffs and other individuals and organizations similarly situated, consists of military intelligence reports (Exhibit A to plaintiffs' complaint) and statements made by a former Army captain in military intelligence (Exhibit B to plaintiffs' complaint), some of which were confirmed by officials in the Department of Defense (Exhibit D to the plaintiffs' complaint; Exhibits A, B, H and I to Speiser Affidavit). The

[3] All the facts related here were before the District Court upon its dismissal of plaintiffs' complaint. They must of course be taken as true in face of the defendants' motion to dismiss. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951); *Clark* v. *Uebersee Finanz Korporation*, 332 U.S. 480 (1947).

evidence before the district court can be summarized as follows: (1) the Army has approximately 1,000 plainclothes intelligence agents stationed in 300 offices throughout the United States; (2) these agents intrude themselves into civilian politics by monitoring and reporting the constitutionally protected political activities and associations of civilians; (3) the Army Intelligence Command has maintained a computerized data bank on political protests and the persons and organizations participating in them; (4) the same Command has published an "identification list," sometimes with photographs, of persons present at political rallies and public assemblies, and (5) Army intelligence agents have conducted undercover operations within the civilian community.

A. *Surveillance of the Plaintiffs and Others Similarly Situated.* Exhibit A to the plaintiffs' complaint is a document entitled, "USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12," containing "items of intelligence interest for the period 0600 hrs, Monday, 11 March 68 to 0600 hrs, Monday 18 March 68." This document is a report of constitutionally protected political activities of plaintiffs and others similarly situated, and, upon information and belief, is representative of similar such reports prepared weekly by military intelligence units, distributed to civilian and military officials within the Department of Defense and to each intelligence unit and troop command in the Continental United States as well as Army headquarters in Europe, Alaska, Hawaii and Panama,[4] and filed

[4] Exhibit A is expressly directed to: "CG FIRST ARMY (THRU 109TH MI GP); CG, THIRD ARMY (THRU 111TH MI GP); CG FOURTH ARMY (THRU 112TH MI GP); CG, FIFTH ARMY (THRU 113TH MI GP); CG, SIXTH ARMY (THRU 115th MI GP); CG, XVIII ABN CORPS; CG, III CORPS

in one or more data banks in the Department of the Army. Typical of the reports concerning the activities of individual plaintiffs are the following:

FRIDAY, 15 MARCH 1968:

PHILADELPHIA, PA.: A. *THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE* SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. *CONRAD LYNN,* AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEETING. FOLLOWING THE QUESTION AND ANSWER PERIOD ROBERT EDENBAUM OF THE *CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS* STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.

B. *REV. ALBERT CLEAGE, JR.,* THE FOUNDER OF THE BLACK CHRISTIAN NA-

---

(THRU DCSI FOURTH ARMY); CG, MDW (THRU 116TH MI GP); CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY); CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY); CG, 82D ABN DIV (THRU XVIII ABN CORPS); CG, 5TH INF DIV (THRU DCSI FIFTH ARMY); CG, USARHAW (THRU 710TH MI DET); CG, FT DEVENS (THRU 108TH MI GP); CO, 902D MI GP (THRU 116TH MI GP); CO, 108TH MI GP; CO, 109TH MI GP; CO, 111TH MI GP; CO, 112TH MI GP; CO, 113TH MI GP; CO, 115TH MI GP; CO, 116TH MI GP; CO, 710TH MI DET; DIRECTOR ANMCC (PASS TO DIA ELEMENT); USAINTC LNO, PENTAGON." Eleven other recipients are indicated by code.

TIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS.

MONDAY, 18 MARCH 1968:

PHILADELPHIA, PA.: MEMBERS OF THE *VIETNAM WEEK COMMITTEE* COMPOSED LARGELY OF PROFESSORS AND STUDENTS OF THE UNIVERSITY OF PENNSYLVANIA, WILL CONDUCT A "SLEEP-IN" TO PROTEST THE SCHEDULED APPEARANCE OF THE DOW CHEMICAL COMPANY RECRUITERS ON CAMPUS. THE NEXT DAY, 19 MARCH, THE SAME ORGANIZATION WILL SPONSOR A PROTEST RALLY ON CAMPUS. [emphasis added to indicate individual plaintiffs].

Others similarly situated are named in additional reports contained within Exhibit A:

MONDAY, 11 MARCH 1968:

HARTFORD, CONN.: APPROXIMATELY 20 PERSONS PICKETED OUTSIDE THE U.S. FEDERAL BUILDING. THE PROTESTORS CARRIED PLACARDS DENOUNCING THE WAR IN VIETNAM AND THE PAYMENT OF INCOME TAX. THE DEMONSTRATION WAS SPONSORED BY THE VOLUNTOWN, CONN., CHAPTER OF THE NEW ENGLAND COMMITTEE FOR NON-VIOLENT ACTION.

WEDNESDAY, 13 MARCH 1968

BROOKLYN, N.Y.: ABOUT 35 PERSONS PARTICIPATED IN A DEMONSTRATION AT THE MAIN GATE OF FORT HAMILTON TO PROTEST THE SCHEDULED INDUCTION OF PETER BEHR. MANY OF THE PROTESTORS DISTRIBUTED LEAFLETS AND FLOWERS TO PERSONS ENTERING THE FORT. THE DEMONSTRATION LASTED APPROXIMATELY ONE AND ONE HALF HOURS AND ENDED WITHOUT INCIDENT.

COLUMBIA, S.C.: APPROXIMATELY 200 NEGROES FROM ALLEN UNIVERSITY AND BENEDICT COLLEGE IN COLUMBIA JOINED A GROUP OF ABOUT 900 STUDENTS FROM SOUTH CAROLINA STATE COLLEGE (SCSC) AND CLAFLIN COLLEGE, ORANGEBURG, S.C., IN A DEMONSTRATION AT THE STATE CAPITOL BUILDING. THIS PROTEST WAS A CONTINUANCE OF THE DEMONSTRATION HELD BY SCSC STUDENTS AT CAPITOL ON 7 MAR 68 (REFERENCE USA INTC WEEKLY SUMMARY NUMBER 68-11). ABOUT 20 SOUTH CAROLINA STATE PATROLMEN EQUIPPED WITH BATONS, PISTOLS, GAS-MASKS AND STEEL HELMETS WERE ON HAND TO PREVENT ANY VIOLENCE. FOLLOWING AN UNSUCCESSFUL ATTEMPT BY APPROXIMATELY 30 NEGRO DEMONSTRATORS TO ENTER THE STATE CAPITOL, THE ORANGEBURG PROTESTORS RE-BOARDED THIRTEEN CHARTERED BUSES AND RETURNED TO THEIR RESPECTIVE SCHOOLS. DURING THE DEMON-

STRATION ABOUT FIFTEEN NEGROES, INCLUDING JAMES WESTON, SOCIOLOGY PROFESSOR AT SCSC, WERE ADMITTED TO THE GOVERNOR'S OFFICE FOR A BRIEF CONFERENCE. THERE ARE NO DETAILS ABOUT WHAT TOOK PLACE IN HIS OFFICE.

SUNDAY, 17 MARCH 1968:

WASHINGTON, D.C.: A. ABOUT 21 MEMBERS OF AN ORGANIZATION KNOWN AS MOVIMIENTO INSURRECTIONAL DE RECUPERACION REVOLUCIONARIA (MIRR) PARTICIPATED IN A PEACEFUL DEMONSTRATION AT THE WHITE HOUSE. THE DEMONSTRATORS CARRIED PLACARDS WHICH REFLECTED THEIR SUPPORT FOR AMERICAN POLICY IN VIETNAM. (NOTE: THIS GROUP WAS PREVIOUSLY REPORTED AS THE MOVEMENT INSURRECTIONAL RECOOPERATION—MIR. REFERENCE USAINTC WEEKLY SUMMARY NUMBER 68-11).

B. *Covert Infiltration of Social and Political Organizations by Military Intelligence Agents.* Although the plaintiffs were denied an evidentiary hearing in the district court, they were prepared to introduce evidence, through the testimony of witnesses who were in the courtroom when the request for a hearing was denied, that the Army's domestic intelligence gathering was not limited to reports on the public activity of plaintiffs and members of their class, but also extended to covert infiltration by intelligence agents of private social, political and religious groups exercising their freedom of association. Plaintiffs' counsel made

an offer of proof to the district judge that one such witness, Oliver Allen Pierce, who had served in the Fifth Division, Military Intelligence Detachment at Fort Carson, Colorado from May 1, 1969 to December 19, 1969, would testify as follows:

> Mr. Askin: . . . [W]e have a witness who is prepared to testify on the activities of the Army at Fort Carson in Colorado, the Army military intelligence group out there . . .
>
> The Court: Exactly what would he say?
>
> Mr. Askin: Your Honor, he will testify that he was instructed to infiltrate a group known as the Young Adults Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization in the Colorado Springs area; that he was instructed to become a member of this group . . . and to make regular reports on what was going on . . . ; that he also was instructed to attend meetings, for example, of the Poverty Program, the Community Action Board in Colorado Springs, make reports on what was said there, who attended, who was doing what, and make regular reports back to the Military Command, which, again, is filed for who knows what future purposes. (Transcript of Proceedings before Judge Hart, April 22, 1970, at pp. 29-30.)

As a supplement to this offer of proof of the testimony of Mr. Pierce, it would be appropriate for the Court to take notice of the testimony in related proceedings[5] by

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[5] Even for purposes of deciding issues on the merits, this Court has taken notice of legislative committee reports, *Carolene Products*

other present and former military intelligence agents that they had engaged in the penetration of private groups for intelligence purposes during the regular course of their military duties. Such testimony was given during proceedings on plaintiffs' motion for a preliminary injunction in *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal docketed *sub nom. ACLU* v. *Laird,* 71 Civ. 1159 (7th Cir. 1971), by Thomas L. Filkins, Director of the Special Operations Section, Region 1, 113th Military Intelligence Group, Evanston, Illinois (Transcript of Proceedings, at pp. 639-40, 810); and John M. O'Brien, former Staff Sergeant, Region 1, 113th Military Intelligence Group (June 1969 to June 1970) (Transcript of Proceedings, at pp. 176-81). Mr. O'Brien also testified about his undercover duties in Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, February 24, 1971, 117 CONG. REC. S7313 (daily ed. May 19, 1971); similar testimony was given in the same hearings by Laurence F. Lane, who served in the Fifth Division Military Intelligence Detachment at Fort Carson, Colorado from December 1968 through June 1970. 117 CONG. REC. S7315-18 (daily ed. May 19, 1971).

C. *Scope of the System.* During the two months between the filing of the complaint on February 17, 1970 and the

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Co. v. *United States,* 323 U.S. 18, 28 (1944), and matters of public history, *Sparrow* v. *Strong,* 3 Wall. 97 (1866), and may of course take notice of other proceedings within the federal judicial system. In the present case plaintiffs ask the Court to notice such materials only for the purpose of recognizing the necessity of remanding the case for development of a full factual record. See Supreme Court Rule 24(1) providing that a brief in opposition to a writ of certiorari should disclose "any matter or ground why the cause should not be reviewed by this court."

oral argument on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss on April 22, 1970, the scope of the Army's surveillance system was partially revealed through statements made by Army spokesmen under the pressure of Congressional inquiry, this lawsuit, and adverse publicity. In identical letters dated February 25 and 26, 1970 and addressed to more than thirty members of Congress and plaintiffs' counsel (Exhibit A to Speiser Affidavit), Robert E. Jordan III, former Army General Counsel and Assistant to the Secretary of the Army for Civil Functions, acknowledged that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission requirements." Mr. Jordan admitted that the Army Intelligence Command maintained a computerized data bank on civilian political activity at Fort Holabird, Maryland, and distributed an "identification list" describing persons and organizations "who might be involved in civil disturbances." Neither the data bank nor the identification list, he stated, were needed by the Army.

Although Mr. Jordan promised that the Fort Holabird computerized data bank would be "discontinued," he made no reference to duplicate information located at other record centers, as described in Exhibit B to plaintiffs' complaint. Because of the inadequacy of Mr. Jordan's letter, Senator Sam J. Ervin, Chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, wrote to defendant Resor on February 27, 1970 to request further information about the scope of the Army's surveillance system. (Exhibit D to Speiser Affidavit.) Senators Abraham Ribicoff and William Fulbright and

Congressman Cornelius Gallagher similarly pressed Mr. Jordan for more information. (Exhibits E and G to Speiser Affidavit; Exhibit A to Plaintiffs' Memorandum of Law in Support of their Motion for a Preliminary Injunction.)

To answer mounting Congressional criticism, Under Secretary of the Army Thaddeus Beal wrote to Congressman Gallagher and Senator Ervin on or about March 20, 1970 (Exhibits G and F to Plaintiffs' Memorandum, *supra*). He admitted the existence of a second "identification list" and promised that it would be recalled and destroyed. He acknowledged the maintenance of a third microfilm and data bank by the Counterintelligence Analysis Division, and stated that it would continue to be maintained. Apart from these admissions, however, Mr. Beal chose to ignore the comprehensive inquiry addressed to him and Mr. Jordan by members of Congress, as well as the bulk of the allegations contained in Exhibit B to the plaintiffs' complaint. By the time their request for a hearing on their motion for a preliminary injunction was denied, therefore, the plaintiffs had reason to believe that the Army was concealing the existence of:

(1) a large microfilm data bank on civilian political activity indexed by computer and maintained by the Counterintelligence Analysis Division (CIAD) of the Office of the Army Assistant Chief of Staff for Intelligence;

(2) a second computerized domestic intelligence data bank maintained by the Continental Army Command at Fort Monroe, Virginia;

(3) extensive regional files maintained by the G-2s of the First, Third, Fourth, Fifth, and Sixth Armies, and the Military District of Washington;

(4) extensive regional files maintained by the 108th, 109th, 111th, 112th, 113th, 115th, and 116th Military Intelligence Groups and the 710th Military Intelligence Detachment, at Fort Devens, Massachusetts; Fort Meade, Maryland; Fort McPherson, Georgia; Fort Sam Houston, Texas; Fort Sheridan, Illinois; San Francisco, California; and Honolulu, Hawaii, respectively;

(5) cards and documents stored at the U.S. Army Intelligence Command's Headquarters from which the Command's computerized data bank was organized and made operable;

(6) a second blacklist, much larger than the first, popularly known as the "Compendium" and published by the Counterintelligence Analysis Division as a two-volume, yellow covered, looseleaf publication entitled, *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest,* which describes numerous individuals and organizations unassociated with the armed forces;

(7) other publications, including monthly intelligence summaries published by each of the stateside Army commands, which describe individuals and organizations active in lawful political protests of no concern to the Army.

WHY THE WRIT SHOULD BE DENIED

I.

The Incomplete Record in This Case and the Lack of Finality of the Judgment Below Require That the Petition for a Writ of Certiorari Be Denied.

This case is not ripe for review by the Supreme Court. Although the plaintiffs are seeking extraordinary injunctive relief against the military arm of the executive, they have had no opportunity to build a factual record upon which to substantiate the allegations in their complaint. On April 22, 1970, the plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction, but their request to proceed with witnesses and documentary evidence was denied by the court. After oral argument the district judge denied plaintiffs' motion for injunctive relief, and granted the defendants' cross motion to dismiss the complaint. On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of the District Court—which had the effect of nullifying the plaintiffs' lawsuit in the trial court before it had begun—was reversed and the case remanded for the evidentiary hearing the plaintiffs had originally sought. In explaining the remand order, Judge Wilkey pointed out that "the record now before us is much too incomplete for a court to determine the ultimate questions" in the case (App. A, at 34). It is this same incomplete record that the government asks this Court to review.

The practice of the Supreme Court not to grant certiorari to review a nonfinal judgment, "such as one remanding the

case to the district court for a new trial," Stern and Gressman, SUPREME COURT PRACTICE 180 (4th ed. 1969), should be followed in this case. The sufficiency of plaintiffs' claim as a cause of action cannot be demonstrated without a full hearing [see II, *infra*], and this Court cannot decide the important issues presented without a full record before it. Indeed, the Court has warned that "summary procedures, however salutary . . . present a treacherous record for deciding issues of far-flung import." *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948). Accordingly, this case lacks finality, and that fact "of itself alone furnishe[s] sufficient ground for the denial [of certiorari]." *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See also *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *American Construction Company* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893).

The government's petition for certiorari invites the Court to consider important constitutional questions with a wholly inadequate factual record which fails to portray in sufficient detail the concrete setting of the constitutional claims. Cf. *Kennedy* v. *Silas Mason Co.*, *supra*. Were certiorari to be granted, it is likely that the Court would dismiss the writ after oral argument as improvidently granted, since "the record relevant to the constitutional claims . . . is insufficient to permit decision." *Johnson* v. *Massachusetts*, 390 U.S. 511 (1968). See also *Wainwright* v. *New Orleans*, 392 U.S. 598 (1968); *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968) ("the record is not sufficiently clear and specific to permit decision of the

important constitutional questions involved"). That disposition would be wasteful of judicial time, contrary to the purpose of review, and prejudicial to plaintiffs' interests in having their claims fairly litigated. To hear the case at this premature stage would be to repeat the experience suffered by plaintiffs in *Board of Education* v. *Allen*, 392 U.S. 236, 248 (1968), another case of major constitutional dimension which reached the Court after summary proceedings below:[6]

> *Against this background of judgment and experience, unchallenged by the meager record before us in this case,* we cannot agree with appellants . . . . *This case comes to us after summary judgment entered on the pleadings.* Nothing in this record supports the proposition that all textbooks . . . are used by the parochial schools to teach religion . . . . [Accordingly], *we are unable to hold, based solely on judicial notice,* that this statute results in unconstitutional involvement of the State with religious instruction. [Emphasis supplied.]

II.

In Addition to the Fact That the Record Is Inadequate to Warrant a Grant of Certiorari, the Court Below Was Correct in Concluding That Plaintiffs' Claim Was Justiciable and That Plaintiffs Had the Requisite Standing to Sue.

A. *Plaintiffs' Claim Is Justiciable*

The rules of justiciability subsumed under Article III of the Constitution require a court to decide " 'whether the

[6] In *Allen*, the plaintiffs themselves were responsible for the inadequacy of the record. In the case at bar, the plaintiffs want a trial so that the facts may be fully developed.

facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant 'the issuance of'" judicial relief, *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969), quoting from *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

The considerations bearing on justiciability have been modified in the First Amendment area. See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). This occurs notably in situations where governmental practices exert broadside pressures against First Amendment activities, but without the application of formal sanctions against particular persons. Under these circumstances ". . . a plaintiff need not [and often cannot] invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." *NSA* v. *Hershey*, 412 F.2d 1103, 1110 (D.C. Cir. 1969); cf. *Dombrowski* v. *Pfister, supra; Reed Enterprises* v. *Corcoran*, 354 F.2d 519, 523-24 (D.C. Cir. 1965). Consequently, ". . . suits alleging injury in the form of a chilling effect may be more readily justiciable than comparable suits not so affected with First Amendment interests." *NSA* v. *Hershey*, *supra* at 1123. See also *Reed Enterprises* v. *Corcoran*, *supra* at 523. The instant case arises well within the parameter of First Amendment justiciability, since the plaintiffs are not complaining about a potentiality but rather about the *actual* and *current* application of the Army's surveillance practices.[7] The government has consistently

[7] The Government in the court below placed great emphasis on language in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 92

failed to address itself to the complaint,[8] which the Court of Appeals characterized as follows:

> [A]ppellants contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on appellants and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech. The baleful effect, if there is one, is thus a present inhibition of lawful behavior and of First Amendment rights. "The peculiar feature of suits alleging a First Amendment chilling effect . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interest if he *does not* speak or act as he says he wants to." *National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 64, 412 F.2d 1103, 1111 (1969). If the Army's intelligence system causes such injury it may be en-

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(1947), that when a plaintiff is faced with the mere possibility of adverse action his suit will not be justiciable unless it "meets the requirements of defined rights and a definite threat to interfere with a possessor of the menaced rights . . . ." In repeating the substance of this language in its petition for certiorari, the Government apparently does not recognize that this Court has held that the *actual application* of an overbroad policy, such as the Army's surveillance system, which affects freedom of expression, meets the *Mitchell* requirement, notwithstanding the fact that the policy carries with it no penalty beyond its inhibiting effect. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). In some cases even the *mere threat* of enforcement of such a policy, e.g., *NSA* v. *Hershey*, 412 F.2d 1103 (D.C. Cir. 1969), has been held sufficient to overcome the limiting language in *Mitchell*.

[8] Which, on the Government's motion to dismiss, must be taken as true. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951).

> joined if the system in operation exceeds the authority granted by Congress, see *Kent* v. *Dulles*, 357 U.S. 116 (1958) . . . or, if within its statutory authority, it nevertheless creates more than an 'incidental' burden on First Amendment rights, and thus violates the Constitution. See *United States* v. *O'Brien*, 391 U.S. 376 (1968). (App. A, p. 25, n. 16.) [Emphasis in original.]

In dwelling in its petition upon the "threat of the unknown" and the possibility of future misuse of the fruits of surveillance, the government hopes to obscure the immediacy of the burdens on speech and assembly alleged in the complaint.* But it is precisely because of the immediacy of the threat posed by the Army's surveillance that the plaintiffs' suit is ready for trial; to await further events as suggested by the government would not make the suit more ripe but would only increase the injury to plaintiffs' constitutional rights. Cf. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 536 (1925). Unlike other First Amendment cases which were held to be justiciable even though there existed, however attenuated, some possibility for a court to consider the critical constitutional issues presented when raised in defense to a criminal prosecution, e.g., *Dombrowski* v. *Pfister*, *supra*; *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967);

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* In related contexts, this Court has held that the chilling effect of statutes banning anonymous advocacy, *Talley* v. *California*, 362 U.S. 60 (1960), or requiring affirmative disclosure of membership, or affiliation, *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *NAACP* v. *Alabama*, 357 U.S. 449 (1958), arises not merely from the possibility that public officials will misuse the information revealed, but rather from the immediate and sometimes irrational fear of private reprisals and community pressure, which is not always susceptible to precise proof.

NSA v. *Hershey, supra,* there is no foreseeable or realistic prospect of later judicial intervention to safeguard the rights which have been and are continuing to be abridged in the case at bar.[10]

The government suggests that the Court "await a case presenting concrete evidence of unlawful inhibitory action by the military, or a real threat of misuse of information; the issues should not now be adjudicated on this record

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[10] The government, in its petition at p. 8, n. 3, contends that a directive from the Secretary of the Army to the Chief of Staff on March 6, 1970 which purported to limit the "intelligence activities complained of in the present case and directed the personnel responsible to concentrate on the more important and likely sources and locales of violence"—has rendered this case moot. This assertion is baseless for two reasons. First, as Judge Wilkey observed in dismissing the same argument made by the government in the court below, "[i]f the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights" (App. A, p. 34). Second, the evidence which the plaintiffs will introduce upon remand to the district court will prove that the Army's domestic intelligence system has continued to operate beyond any reasonable necessity since the institution of this lawsuit, notwithstanding any directive to the contrary from the Secretary. For example, plaintiffs are in possession of documentary intelligence reports for the Minneapolis-St. Paul area, similar to those in Exhibit A to the Complaint, *supra* at pp. 6-9, entitled "Intelligence Summary for the Week of 19-23 Oct 1970" (also "2-6 Nov 1970" and "9-13 Nov 1970) and "obtained through contact with the . . . 113th Military Intelligence Group," as well as local, state and federal law enforcement agencies. A typical report reads as follows:

> A peace demonstration march is scheduled in Minneapolis on October 31st. The march is to begin at 12:00 noon beginning at two points, the University of Minnesota campus and Lake Harriet, and is to terminate at Loring Park in downtown Minneapolis. The event is reportedly sponsored by the Minnesota Peace Action Council.

which presents only abstract legal issues involving, at best, the speculative impairment of constitutional rights." (Petition, p. 10, n. 4.) This argument must be rejected for two reasons. First, the reason that the case "presents only abstract legal issues" is because of the government's motion to dismiss. If the government had not contested plaintiffs' desire to go to trial in the district court, there would be an evidentiary record in this case to give the Court the perspective necessary to adjudicate the serious constitutional issues. Second, the suggestion that the Court await "a real threat of misuse of information" is to urge upon the Court the peculiar doctrine that constitutional violations must reach epidemic proportion before becoming justiciable. The fact is that "a delay in adjudication holds no promise of 'a better case'." *NSA* v. *Hershey, supra* at 1119.

The Government compounds its misunderstanding of the complaint by contending that plaintiffs do not allege any specific injury to themselves. This Court has consistently held that a challenge to governmental action which inhibits protected speech is justiciable even though the injury complained of is the intimidation itself and not any tangible sanction or penalty. See, e.g., *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring) ("... inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. ... [W]e cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one."); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); *Talley* v. *California*, 362 U.S. 60, 65 (1960); *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958); see also *Wolff* v. *Selective Service Local Board No. 16, supra; Hentoff* v. *Ichord*,

318 F. Supp. 1175 (D.D.C. 1970); *Straut* v. *Calissi*, 293 F. Supp. 1339 (D.N.J. 1968); *Local 309, United Furniture Workers of America* v. *Gates*, 75 F. Supp. 620, 624 (N.D. Ind. 1948). See generally Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969). For the Court to hold otherwise would establish the dangerous principle that governmental activity which seriously damages First Amendment interests but causes no other identifiable injury is not amenable to judicial control. Such a principle has been expressly rejected by the Court. Compare *Lamont* v. *Postmaster General*, 381 U.S. 301, 307 (1965), with *Bee See Books, Inc.* v. *Leary*, 291 F. Supp. 622, 627 (S.D.N.Y. 1968).

Since the complaint is of sufficient "immediacy and reality" to be justiciable under First Amendment standards, the government's contention that the separation of powers doctrine precludes resolution of the merits of the case must also fall. Although "one branch of the government may not lightly interfere with the exercise of its legitimate power by a coordinate branch," *Davis* v. *Ichord*, 442 F.2d 1207, 1213 (D.C. Cir. 1970), this admonition does not extend to cases where preferred constitutional rights are alleged to be infringed by a branch of government acting beyond the scope of its authority. *Powell* v. *McCormack*, 395 U.S. 486, 548-49 (1969). See also *United States* v. *Robel*, 389 U.S. 258, 263-64, 267-68 (1967); *Stamler* v. *Willis*, 415 F.2d 1365, 1369-70 (D.C. Cir. 1969) *cert. denied, sub nom. Ichord* v. *Stamler*, 399 U.S. 929 (1970).

B. *The Plaintiffs Have Standing to Sue*

1. *Plaintiffs Have Standing to Sue Because Their First Amendment Rights Are Abridged.* The rules of standing applied by the federal courts have been fashioned with reference to the status of the party whose standing is challenged and the type of complaint he has alleged. Thus, a court "must look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968). Under broadened principles of standing to raise First Amendment issues, *Flast* v. *Cohen, supra; NSA* v. *Hershey, supra; Wolff* v. *Selective Service Local Board No. 16, supra,* the requisite nexus between the plaintiff's status and his claim is his "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), and it is this demonstrated nexus which makes his allegation of injury sufficient to give the plaintiff standing to sue.[11]

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[11] This Court has relaxed the standing requirement in public actions. *Flast* v. *Cohen, supra.* There is also considerable support for the position that the English practice underlying constitutional standing theory "did not in fact demand injury to a personal interest as a prerequisite to attacks on jurisdictional excesses, and that neither the separation of powers nor advisory opinion doctrines as originally envisaged require insistence on a personal stake as the basic element of standing to make such challenges." Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 817-18 (1969). See also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 451, 498 (March 1966); cf. *Wadsworth* v. *Queen of Spain* [1851] 17 Q.B. 171, 214 ("we find it laid down in books of the highest authority that, where the court to which prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as of the defendant himself. 2 COKE 607; *Com. Dig. Prohibition* (E)." (Campbell, L. J.).). While the

"A chilling effect which amounts to a justiciable injury confers standing to challenge the source of the chill on any person who plausibly alleges that he is chilled." *NSA* v. *Hershey, supra,* at 1119, n. 46. As attested by Judge Wilkey's opinion below, the plaintiffs have "plausibly argued" that their status as civilians attempting to engage in protected First Amendment activity gives them standing to complain that First Amendment interests are concretely abridged by the overbroad domestic surveillance system of the Army:

> If the Army's system does indeed derogate First Amendment values, the appellants are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all of the appellants and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records. Since this is precisely the injury of which appellants complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine, on the issue of whether the actions complained of do in fact inhibit the exercise of First Amendment rights. Nor should the fact that these particular persons are sufficiently uninhibited to bring this suit be any ground for objecting to their standing. See *NAACP* v. *Alabama,* 357 U.S. 449, 459 (1958); *Anderson* v. *Sills,* 56 N.J. 210, 265 A.2d 678, 684 (1970). (App. A, p. 26, n. 17).

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plaintiffs do not feel it necessary to take this position because they meet the requirements of *Flast* v. *Cohen, supra,* it underscores the lack of merit in the Government's contention that the plaintiffs lack standing to sue.

Without expressing any opinion as to the ultimate issue of proof, therefore, the court below properly concluded that "it is the operation of the system itself which is the breach of the Army's duty toward appellants and other civilians." (App. A, pp. 25-27).

The plausibility of the claim that plaintiffs and their class have been chilled is enhanced by two factors overlooked by the government in its petition. First, the complaint alleges that the Army's publicized surveillance of the plaintiffs and collection of dossier information about their activities has an inhibiting effect on other civilians who might associate with them, and consequently abridges their freedom of association. This Court has repeatedly held in an analogous context that government investigative activity which compels disclosure of the membership lists of organizations or the associational ties and activities of individuals can have a chilling effect on free association. See, e.g., *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *NAACP* v. *Alabama, supra; Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957). The effect of such investigation, when it becomes widely known, can result in public harassment of unpopular groups or individuals, and, in some instances, imposition of a stamp of disloyalty. See *Sweezy* v. *New Hampshire, supra,* at 248. Freedom of association, therefore, is chilled both when investigative disclosure leads to informal repression of the opinions of those exposed due to public hostility, *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293 (1961); *NAACP* v. *Alabama, supra,* at 462-63, and when the threat of such disclosure and harassment leads members to refuse to renew organizational ties and dissuades others from joining. *Bates* v. *City of Little Rock, supra,* at 524.

Second, one of the main functions of the chilling effect doctrine is to permit a claimant to vindicate the First Amendment rights of those who are not parties before the court precisely because they are inhibited by the challenged practice. In this case, the Army's surveillance system imposes a burden on the exercise of First Amendment rights which has an "inhibiting effect [on] the flow of democratic expression and controversy upon those directly affected and those touched more subtly." *Sweezy* v. *New Hampshire,* 354 U.S. 234, 248 (1957). As the Court said in *NAACP* v. *Button, supra,* at 432, "in appraising a [practice's] inhibitory effect upon such [First Amendment] rights, this Court has not hesitated to take into account possible applications of the [practice] in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *Winters* v. *New York,* 333 U.S. 507, 518-20. Cf. *Staub* v. *Baxley,* 355 U.S. 313." [12]

Finally, the question of standing must often abide production of evidence below. As Mr. Justice Frankfurter said in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra* at 152, speaking of the necessary "injury" or "controversy" which confers standing on a party, "[t]hese terms have meaning only when contained by the facts to which they have been applied." For that reason alone, certiorari must be denied in this case so that the plaintiffs may have the opportunity, so far denied to them, to produce all the

[12] In *Anderson* v. *Sills,* 56 N.J. 210, 221, 265 A.2d 678 (1970), a case involving surveillance of constitutionally protected activity by New Jersey State officials, the New Jersey Supreme Court in face of a claim that plaintiffs there had no standing, said " . . . there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters." Cf. *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *Straut* v. *Calissi,* 293 F. Supp. 1339, 1342 n. 8 (D.N.J. 1968).

available evidence so that they can show the extent of the illegal government action and its impact upon the plaintiffs and the class they represent, and consequentially demonstrate in concrete factual terms the quality of their standing.

2. *Plaintiffs Have Standing to Sue Because the Department of the Army Has Exceeded Its Authority in Developing an Overbroad Domestic Surveillance System.* "[S]tanding to challenge official action is more apt to exist when that action is not within the scope of official authority than when the objection to the administrative decision goes only to its correctness." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra* at 156 (Frankfurter, J., concurring). In this case, plaintiffs specifically alleged that the military surveillance program "exceeds the lawful needs and authority of the United States Army and is without any lawful statutory authority." (complaint ¶18).

The government argued in the courts below that the Army surveillance system is based on the statutory authority of 10 U.S.C., sections 331, 332, 333, and 334 which provide for the domestic use of the armed forces by the President "to enforce the laws of the United States"[13] or "suppress insurrection"[14] when local and state authorities can no longer do so themselves. These statutes contain no reference to lawful political activity and do not contemplate the surveillance and maintenance of dossiers on individuals engaged in such activity by agents under the control of the Army.[15] Indeed, since protection of the

[13] 10 U.S.C. §332.

[14] 10 U.S.C. §333.

[15] 18 U.S.C. §§592 and 593, in fact, make it a criminal offense for officers and members of the armed forces to interfere with elections, including "intimidation" of voters.

political freedom of citizens and organizations forms the very essence of constitutional liberty and security, *Bates* v. *City of Little Rock, supra; NAACP* v. *Alabama, supra;* it is difficult to imagine any construction that would do more violence to the statutory language than the one urged by the Government. That the executive has a statutory authority to combat *illegal overt acts* amounting to "insurrection" [16] *after* the failure of civilian authority, does not mean that the Army can institute a program of domestic surveillance which, the evidence on remand will show, has become a "dragnet which may enmesh anyone." *Herndon* v. *Lowry,* 301 U.S. 242, 263 (1937).

Any doubt that the Army's statutory domestic mission does not authorize military spying on civilian politics is put to rest by *Schneider* v. *Smith,* 390 U.S. 17, 25-27 (1968). In that case the Court rejected the contention advanced by the government that the Magnuson Act [50 U.S.C., §191(b)] empowering the President to "safeguard vessels against destruction, loss or injury from sabotage or other subversive acts," allowed him to promulgate regulations authorizing the Coast Guard Commandant to gather information about the political beliefs and associations of merchant seamen. The Court held that the statute did not contemplate such sweeping investigation. The Court concluded that since "the purpose of the Constitution and Bill of Rights was to take government off the backs of the people, . . . the right peaceably to assemble and to petition, and the associational freedom that goes with those

[16] Cases arising under the predecessor statute to 10 U.S.C., §333 construed "insurrection" as "a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in a city or state." *In Re Charge to Grand Jury,* 62 F. 828, 830 (D. Ill. 1894). See also *Presser* v. *Illinois,* 116 U.S. 252 (1886).

rights, create a preserve where the views of the individual are made inviolate." 390 U.S. at 25-26. See also *Cole* v. *Young*, 351 U.S. 536 (1955) (Executive Order aimed at "insuring the 'unswerving loyalty' of all [government] employees, regardless of position" held to exceed authority delegated to executive by statute relating to national security).

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

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No. 71-288

In the Supreme Court of the United States

OCTOBER TERM, 1971

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ARLO TATUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ARLO TATUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals (App. 129–155) [1] are reported at 444 F. 2d 947. The order of the district court and its "Findings of Fact and Conclusions of Law" (App. 126–127) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1971 (App. 129). Mr. Justice Black extended the time within which to file a petition for a

[1] "App." references are to the printed Appendix filed by the parties in this Court.

writ of certiorari to August 25, 1971. The petition was filed on that date; it was granted on November 16, 1971 (App. 156). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondents' claim—that the mere existence of a civil disturbance intelligence system within the Department of the Army generates a chilling effect on the exercise, by persons other than plaintiffs, of First Amendment rights—is justiciable, and is one that these respondents have standing to raise.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides in relevant part:

> SECTION 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *—to Controversies to which the United States shall be a party; * * *

The First Amendment of the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech * * *; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sections 331, 332 and 333 of Title 10, United States Code, are set forth in Appendix A, *infra*, at pp. 43–44.

STATEMENT

Respondents, on behalf of themselves and others, commenced this class action in the United States District Court for the District of Columbia, challenging certain intelligence-gathering operations of the Department of the Army, insofar as they related to surveillances of "lawful political activity" (App. 8), as beyond legitimate military needs and as an indirect infringement of their constitutional rights guaranteed by the First, Fourth, Fifth and Ninth Amendments. They sought a declaratory judgment that this domestic surveillance activity of the Army is unconstitutional or otherwise illegal, preliminary and permanent injunctions forbidding all such activity in the future, and a mandatory injunction ordering the Army to turn over to the court for destruction all information obtained by such intelligence work which it then had on hand (App. 11–12). On April 29, 1970, the district court, pursuant to the government's motion (App. 73), dismissed the complaint on jurisdictional grounds and denied respondents' request for a preliminary injunction (App. 126–127). A divided court of appeals reversed and remanded the case to the district court for further proceedings on the merits (App. 129–155).

1. The respondents in this case are four individuals [2]

[2] Arlo Tatum, Executive Secretary of the Central Committee for Conscientous Objectors; Conrad Lynn, "a black attorney admitted to practice before the New York State Court of Appeals"; Rev. Albert B. Cleage, Jr., Minister of the Shrine of the Black Madonna, Detroit, Michigan; Benjamin N. Wyatt, Jr., "a black attorney admitted to practice in the State of California" (App. 6–7).

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and nine unincorporated associations.[3] They instituted the present suit against the Secretary of Defense, the Secretary and Chief of Staff of the Army and the Commanding General, U.S. Army Intelligence Command (App. 8), on their own behalf "and on behalf of all other individuals and organizations who wish to exercise their right under the First Amendment of the United States Constitution to engage in peaceful political protest, demonstrations, marches, rallies, church meetings and other forms of constitutionally protected expression and assemblies without surveillance by defendants' agents and without becoming the subject of dossiers, reports, and files * * *" (App. 8).

2. The surveillance activity complained of essentially "began in the summer of 1965" (App. 23);[4] "its purpose was to provide early warning of civil disorders which the Army might be called upon to quell" (*ibid*). Approximately "1,000 plainclothes investi-

[3] Women Strike for Peace; Chicago Area Women for Peace; The Vietnam Week Committee of the University of Pennsylvania; The Vietnam Education Group (Knoxville, Tennessee); Veterans for Peace in Vietnam; The American Federation of State, County and Municipal Employees; The Vietnam Moratorium Committee; Clergy and Laymen Concerned About Vietman; War Resisters League (App. 6–7).

[4] The Statement is based essentially on the article by Mr. Pyle, attachments to affidavits and memoranda filed by respondents in support of their motion for a preliminary injunction, and affidavits filed by petitioners in support of their motion to dismiss. Although the accuracy of petitioners' affidavits has not been conceded, respondents have made no specific allegation that they are inaccurate.

gators, working out of some 300 offices from coast to coast" (App. 23, 52), were assigned the task of attending, and reporting on, selected public gatherings and civilian demonstrations across the country that were thought to have a potential for civil disorder (App. 13–21, 52, 69). Such assignments were "separate and apart from" (App. 79) the agents' regular security-clearance investigations relating to "whether uniformed members of the Army, civilian employees and contractors' employees should be granted access to classified information" (App. 52, 76–77, 83), a task—not in any way involved in the present litigation—that accounted for at least "94% of the time of Intelligence Command field personnel" (App. 52) throughout the period here in question.

a. *Surveillance.* In July 1967, civil disturbances in Detroit, Michigan, erupted into widespread disorder and federal troops were called in to assist the local authorities (App. 87). As a result of that experience, "the Army initiated a comprehensive review of civil disturbance plans, training and operations,"[5] which culminated in "the development of a detailed family of contingency plans for operations in support of local authorities" (*ibid*). As the use of federal troops to quell civil disturbances increased throughout the Fall

[5] The Army at that time had a general contingency plan for assisting local authorities to quell civil disturbances, but it was felt that something more specific was needed to coordinate the efforts of the federal government in this area with state and local authorities (App. 87–88).

of 1967 and into the Spring of 1968 (App. 54, 97),[6] so, too, did the Army's domestic surveillance activities (App. 23, 54). Because of the need for "the Department of the Army [to] keep itself informed in advance as to potential situations where troops may be necessary" (App. 71), the attendance of military intelligence agents at public gatherings that portended possible civil disorder became more frequent (App. 13–21).

The efforts of these Army personnel were directed "primarily at ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act" (App. 70).[7] For example, it was relevant for planning purposes to determine which cities had a

[6] As the majority of the court of appeals pointed out (App. 136): "During the period 1967–1968 the National Guard was called upon eighty-three times and the Army four times to quell cases of civil disorder." In the month of April 1968 alone, following the assassination of Dr. Martin Luther King, Jr. (App. 91–97, 103–108), there were 237 civil disorders, 27,000 arrests, 43 deaths, over 58 million dollars in property damage, and over 58,000 federal troops who were used 25 times to quell civil disturbances. *U.S. News and World Report*, September 2, 1968, p. 68.

[7] As the court of appeals observed (App. 136–137), when the Army is called upon to assist local authorities it is acting essentially as "a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman." And see *Report, National Advisory Commission on Civil Disorders*, p. 269 (Supp. March 1, 1968).

high potential for violence (App. 71), which issues appeared to be the more volatile, and which speakers were most likely to excite a crowd to action (App. 13–21, 84). Also important was some assessment of the ability of local authorities to control civil disorders, including an appraisal of what size demonstration they could handle on their own (App. 90). In addition, some intelligence information was needed simply to alert the Army as to how and where to deploy troops within particular cities if it became necessary to use them (App. 70–71).

b. *Reports and files.* To the extent that these data came from the Army's domestic surveillance activity at public gatherings,[8] they were forwarded by teletype to the Intelligence Command (App. 54) in what were called "spot reports" (App. 80, 85). Representative samples of such reports are set forth at App. 13–21. They contain essentially the time and place of the demonstration under observation, its purpose, the size of the crowd and the identity of organizers, speakers or principal participants,[9] and a comment on whether the crowd dispersed peacefully or the demonstration ended in civil disorder (*ibid.*).

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[8] There are no allegations that the Army has conducted surveillance of wholly private activity (App. 137–138, 149 n. 2). Moreover, as the affidavits filed in this case show (App. 71), "the overwhelming bulk" (App. 71) of intelligence information relating to the Army's civil disturbance mission was obtained "from the FBI and state and local police agencies" (App. 54; and see *id.* at 23).

[9] "The record shows that most if not all of the [respondents] and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records" (App. 140 n. 17).

In 1967 and 1968, this intelligence information was stored by the Army in a special civil disturbance computer data bank located at Fort Holabird, Maryland (App. 52, 55, 69).[10] In addition, the names and descriptions of those individuals and organizations contained in the "spot reports" were placed on a separate "identification list" (App. 54, 71), which was distributed to Army field agencies.[11] The reports themselves were then "routinely destroyed" (App. 80), generally within 60 days of the date of receipt (App. 72, 85).

Respondents do not allege that the Army had misused this intelligence data, and the court of appeals, although divided on other points, essentially agreed

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[10] Fort Holabird was the headquarters of the U.S. Army Intelligence Command (App. 52); the official designation of the office was "CONUS Intelligence Branch," which was the Army's acronym for Continental United States Intelligence Branch (App. 26).

[11] Both the civil disturbance computer data bank and the special identification list were kept apart from the U.S. Army Investigative Records Repository (USAIRR) (App. 79), which "was established to serve as a central filing system for all security and criminal investigations" (App. 83) of Army personnel, civilian employees and contractors' employees (App. 77). The USAIRR contains approximately 7 million files relating to these types of investigations (App. 77, 83); some of the older files are on microfilm (App. 83). To the extent that any of the information in these files can be traced to the Army's civilian surveillance activity, that information is now being removed from USAIRR and destroyed. Primarily because of the size of USAIRR, the Secretary of Defense directed in May 1965 that "a central index of all security investigations conducted by Department of Defense agencies be established" (App. 53). It is called the Defense Central Index of Investigations and does not directly reflect the civil disturbance information that was collected by the Army.

that "[i]n the instant complaint there are no allegations or claims that any information gathered by the Army has been used in a manner that has injured [respondents] or imposed on them any penalty attributable to their exercise of their First Amendment rights." (App. 151, and see *id.* at 139).

3. Civil disorders reached their peak in the Spring and Summer of 1968.[12] Thereafter, as the level of turbulence abated, and the need to maintain federal troops on civil disturbance alert declined, the Army reexamined its domestic intelligence system; as a result, this type of surveillance activity decreased (App. 79–80, 82, 84).

The affidavits in this case show (App. 54–55, 80, 85) that the number of public demonstrations attended by military investigators was systemmatically reduced (App. 54, 82). Observation of civilian political activities became "limited to incidents where there [was] a high potential for violence and disorder growing beyond the capability of state and local police and the National Guard to control" (App. 85). While "spot reports" were for a time still prepared by field personnel and forwarded to Intelligence Command, this practice was severely restricted in June 1970 (see Appendix B, *infra,* pp. 45–52).[13] The

[12] See, *e.g.*, *Reports*, Brandeis University Lemberg Center for Study of Violence (1969); *Disorders—1968*, General Adjustment Bureau, Inc. (1969); *Riot and/or Civil Commotion Report*, American Insurance Association (1969).

[13] In the court below, the government mistakenly referred to this document by the date of March 6, 1970 (App. 146). The directive of that date related only to the destruction of computer data banks (see Appendix C, *infra*, pp. 53–54).

new policy prohibited any transfer of information to a computer data bank (App. 80); an identification list was no longer compiled and maintained (App. 55, 81). Any "spot reports" that had been prepared had to be "destroyed 60 days after publication or 60 days after the end of the disturbance" (App. 80).[14]

In addition to placing these restrictions on current intelligence activity, the military undertook a review of the civil disturbance information collected in the pre-1969 period. It "determined that certain records maintained by the Army were not useful and were not necessary in view of the Army's [civil disturbance] mission" (App. 71). Accordingly, on February 19, 1970, the Assistant Chief of Staff for Intelligence ordered the computer data bank at Fort Holabird to be destroyed (App. 55, 80, 84), and this destruction has been completed.[15] Almost simultaneously, an order went out to the Army field agencies to return to Intelligence Command all copies of the identification list; they too were destroyed (App. 54, 55, 71–72, 81, 84, 86). "[O]ne copy of the identification list and one print out of the bulk of the information in the data

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[14] By direction of the Under Secretary of the Army, one copy of each "spot report" in existence at the time this case was commenced, or prepared thereafter, is to be "retained as long as is necessary in connection with the *Tatum* suit" (App. 72).

[15] Similarly, two other smaller civil disturbance computer data banks at Fort Hood, Texas, and Fort Monroe, Virginia, were also destroyed. The establishment or operation by the Army of any computer data banks relating to civilians or civilian activity is now prohibited without the prior approval of the Chief of Staff and the Secretary of the Army (App. 55, 80, 84–85).

bank" are being retained solely for purposes of the present litigation (App. 72).[16]

4. In early January 1970, an article entitled "CONUS Intelligence: The Army Watches Civilian Politics" appeared in the magazine *The Washington Monthly* (App. 10, 46). Written by Christopher H. Pyle, a former Captain in Army Intelligence who had served as an instructor in the United States Army Intelligence school while in the service, the article (App. 22–43) gave the author's views on what he believed to be the nature and scope of the domestic surveillance activity of Intelligence Command during the 1967–1968 period.[17] Particular attention was devoted to the military's compilation of an identification list, described as a "blacklist" (App. 25), bearing names of private citizens and organizations, and to what the author thought were future plans to establish a civil disturbance "computerized data bank"

[16] A print out of the information in the data banks at Fort Hood and Fort Monroe was also retained in connection with this case. The only other "intelligence files" which the Army has concerning civil disturbances are maintained by the Counterintelligence Analysis Division (App. 85). The information in those files, some of which is stored on microfilm, at one time contained a limited amount of material relating to the Army's civil disturbance mission, most of which had been "received from the FBI and collated in order to permit evaluation" of factors bearing on civil disturbance potential (*ibid.*). We are advised, however, that all such materials have now been eliminated from these "intelligence files"; any information received hereafter by the Counterintelligence Analysis Division relating to the Army's civil disturbance mission must be destroyed within 60 days of receipt.

[17] Mr. Pyle was released from active duty on July 30, 1968 before the Army reexamined its domestic surveillance activity.

(*ibid.*); he was apparently unaware that one had been in existence for some time. In the final portion of the article, under the heading "What Can Be Done," the author stated (App. 39): "An obvious first step is a court challenge of the Army's authority to possess information for which it has no substantial need."

Respondents commenced the present class action on February 17, 1970, relying heavily on Mr Pyle's article (App. 9–10). The district court denied a preliminary motion for a temporary restraining order to halt all current intelligence activity of the Army of the type set forth in the complaint. The government then moved on affidavits to dismiss the complaint on the ground, *inter alia*, that there existed "no justiciable issue, case or controversy and no basis for the granting of equitable, declaratory or other relief" (App. 73).

Following a hearing, the district court dismissed the complaint and denied the respondents' request for preliminary injunctive relief. It ruled (App. 126) that "what in effect the [respondents] are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in this country and magazines." This, in the court's view, failed to state a cause of action. It held that "[respondents] * * * show no unconstitutional action and allege no unlawful action on the part of the [petitioners, and] show no threats to their rights and present no justiciable controversy" (App. 128).

An appeal was taken to the court of appeals, and a divided panel of that court reversed (App. 129–155). The majority concluded that, "[b]ecause the evil alleged in the Army intelligence system is that of overbreadth, *i.e.*, the collection of information not reasonably relevant to the Army's mission to suppress civil disorder, and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time" (App. 142; footnote omitted).

Judge MacKinnon, while concurring "in many of the pronouncements in the majority opinion" (App. 148), dissented on the ground that respondents' "indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding, do not present a case involving facts of sufficient realism and definiteness to confer jurisdiction on the court to making a sweeping constitutional decision affecting important activities of the federal Government" (App. 152).

SUMMARY OF ARGUMENT

This case presents only the threshold question whether these particular respondents can challenge in court the existence of a federal program which admittedly causes them no injury or threat of injury, but allegedly generates a chill on First Amendment rights of millions of other Americans. Our position is that such a claim lacks sufficient focus and con-

creteness to present the constitutional issue in an "adversary context" (*Flast* v. *Cohen*, 392 U.S. 83, 95) as required by the "Case" or "Controversy" language in Article III of the Constitution. In addition, we argue that the named respondents, who readily admit that they are themselves insulated from any chilling effect, have no standing to maintain the present suit as "private attorneys general" on behalf of other members of the public at large.

A. While we recognize that the concept of justiciability has undergone significant expansion in recent years, we do not believe its contours yet require the courts to take cognizance of a "generalized grievance" (*Flast* v. *Cohen, supra,* 392 U.S. at 106) based upon the mere existence of a government program thought by respondents to be perhaps overbroad, although, by their own admission (App. 151), having both a scope and purpose of "unknown" dimensions. The role of the Judiciary in our system of government is confined by the Constitution to the adjudication of "Cases" or "Controversies." Traditionally this has been construed to mean that constitutional issues are subject to judicial review only when presented with "concrete adverseness" (*Baker* v. *Carr*, 369 U.S. 186, 204), in the context of a clearly defined controversy between persons asserting specific, identifiable and conflicting interests.

Consistent with this principle, grounded in substantial part on the separation of powers prescribed by the Constitution, federal courts have in recent

years, when confronted by a claim of injury based upon an alleged chilling effect on First Amendment rights, looked for something more specific than an abstract and ill-defined objection to the mere existence of government conduct. The judicial focus in this area, as in all others, has been the impact of particularized governmental action on the rights of an ascertainable individual or group. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479; *United States* v. *Robel,* 389 U.S. 258; *Hentoff* v. *Ichord,* 318 F. Supp. 1175.

In the instant case, these elements of particularity are not present. The chill that is allegedly generated not on these respondents, but on "millions of Americans," derives solely from the existence of an Army domestic surveillance system, which, as the majority opinion below points out, gathers certain information in connection with the military's recognized civil disturbance mission that is essentially no different from what "a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand" (App. 138). Such a claim, we submit, presents no more than "[a] generalized grievance about the conduct of government" (*Flast* v. *Cohen, supra,* 392 U.S. at 106). As such, it is insufficient to confer jurisdiction on the courts to decide sweeping constitutional issues affecting important activities of the federal government.

B. Nor do these respondents have standing to raise a constitutional challenge to the Army's domestic intelli-

gence operation. They admit that they "are *not people, obviously, who are cowed and chilled*" (App. 148; emphasis in original) by the surveillance activity involved here. Instead, they come before this Court as self-appointed "private attorneys general" on behalf of "millions of Americans not nearly as forward, as courageous, as willing as them to open themselves up to public investigation and public scrutiny" (*ibid*).

Whatever may be the limits of "public interest" standing—a concept that has been significantly expanded in recent years by Congress—we do not believe it yet permits one to gain access to the courts to air his personal protest against some governmental program merely on the basis of a generalized claim of chill on "millions of Americans." Some "logical nexus between the status asserted [by the litigant] and the claim sought to be adjudicated" is still required (*Flast* v. *Cohen, supra*, 392 U.S. at 102). Even when suing in the self-appointed capacity of private attorneys general, respondents must represent something more than a general interest common to the public at large. The group that feels an official breath of cold air on their First Amendment rights must be identifiable by some "distinctive and discriminating harm" (*Barlow* v. *Collins*, 397 U.S. 159, 172 n. 5; Brennan J., concurring and dissenting) that sets it apart from the general citizenry. But, no such trademark of distinctive injury identifies a specific class in this case. This, we submit, is fatal to respondents' claim.

ARGUMENT

A CLAIM THAT THE FIRST AMENDMENT RIGHTS OF OTHERS ARE CHILLED, DUE TO THE MERE EXISTENCE OF ARMY SURVEILLANCE ACTIVITY AT PUBLIC GATHERINGS, DOES NOT ESTABLISH A JUSTICIABLE CONTROVERSY, AND IS NOT A CLAIM THAT THESE RESPONDENTS HAVE STANDING TO RAISE

The constitutional limitation on judicial power of Article III courts, defined only in terms of "Cases" or "Controversies," has evolved within a framework of "justiciability," with respect to the issues raised, and "standing," with respect to the parties raising them. These concepts describe the minimal jurisdictional standards that must be satisfied for a claim to be cognizable in the federal courts. See *Flast* v. *Cohen*, 392 U.S. 893, 94–106.

In the instant case, the respondents seek to enjoin all military domestic surveillance activity relating to the Army's civil disturbance mission on the ground that the very existence of such an intelligence system, whatever its dimensions, generates a chill on others, whomever and wherever they may be, who might wish to attend public demonstrations free from such surveillance. Their claim, we submit, expands traditional notions of justiciability and standing beyond anything that the federal courts hitherto have recognized, even after the judicial expansion in this area in recent years. Sound practical and policy considerations, as well as constitutional doctrine, indicate that such a

further relaxation of these jurisdictional requirements should not be made.[18]

A. RESPONDENTS' COMPLAINT DOES NOT STATE ANY JUSTICIABLE ISSUE

1. "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, *Federal Courts* 34 (1963). "[S]uch advance expressions of legal judgment upon issues which remain unfocused" have long been considered inappropriate; for, the differing positions cannot be "pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States* v. *Fruehauf*, 365 U.S. 146, 157. Thus, as this Court observed in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89: "For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." See *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461, and cases cited.[19]

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[18] Since the relief that respondents seek is equitable, considerable deference should be accorded to the determination of the district court that the claim is not ripe for adjudication.

[19] See also *Davis* v. *Ichord*, 442 F. 2d 1207, 1212 (C.A.D.C.); *Lampkin* v. *Connor*, 360 F. 2d 505, 507 (C.A.D.C.); *Garcia* v. *Brownell*, 236 F. 2d 356, 357–358 (C.A. 9); *Brown & Root, Inc.* v. *Big Rock Corporation*, 383 F. 2d 662, 666 (C.A. 5); *American Dietaids Co.* v. *Celebrezze*, 317 F. 2d 658, 660 (C.A. 2).

The rationale for this requirement of ripeness "has become a blend of constitutional requirements and policy considerations" (*Flast* v. *Cohen*, 392 U.S. 83, 97), which are "not always clearly distinguished" (*Barrows* v. *Jackson*, 346 U.S. 249, 255). They are, however, grounded on a "dual limitation placed upon federal courts by the case-and-controversy doctrine" embodied in Article III to the Constitution (*Flast* v. *Cohen*, *supra*, 392 U.S. at 95):

> In part those words ["'cases' and 'controversies'"] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government * * *.

Treating the claim presented in the instant case as ripe for adjudication would depart from those fundamental principles. Although the complaint alleges overbreadth, the challenge here is really to the very existence of domestic surveillance activity by the Department of the Army. The respondents seek to enjoin all surveillance of "lawful political activity" (App. 8, 11–12); since it is impossible to observe lawful activity becoming unlawful (as when a public meeting becomes riotous), without observing the lawful activity, a prohibition on surveillance of "lawful political activity" (App. 8) would actually be a ban on all surveillance of the kind involved here.

The grounds for such relief are based on the broadest

of generalities. The complaint states (App. 10) that "[t]he purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate [respondents] and other similarly situated * * *." Yet, they are unable to point to a single instance of harassment or intimidation. Compare *Dombrowski* v. *Pfister*, 380 U.S. 479.[20] Respondents allege generally an invasion of their privacy, damage to their reputations and an adverse effect on their employment and their opportunities therefor (App. 10), but they cite no specific examples. Compare *United States* v. *Robel*, 389 U.S. 258. The Army's domestic surveillance system, the complaint further states (App. 10–11), will "cast a pall over lawful political protest in the United States and * * * deter [respondents] and other [*sic*] similarly situated from exercising their First Amendment rights for fear * * * that all of this information [collected by such Army surveillance activity] will be released to numerous federal and state agencies." As the court of appeals pointed out (App. 139), however, plaintiffs "do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground." Compare *Davis* v. *Ichord*, 442 F. 2d 1207 (C.A.D.C.); *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C.).

Such allegations, which the dissent below accurately characterized as "indefinite claims of highly visionary

[20] See also *United States* v. *McLeod*, 385 F. 2d 734 (C.A. 5), where the court was faced with a plausible claim that the purpose of police surveillance at public gatherings was to intimidate and coerce Negro voters.

apprehensions" (App. 152), do not, we submit, present the issue of the constitutionality of the Army's civil disturbance intelligence operations "in an adversary context" (*Flast* v. *Cohen, supra*, 392 U.S. at 95); they do not have the concreteness and sufficiency of focus to make the claims justiciable. There is no assertion here that the activity complained of has caused direct injury to these plaintiffs or others similarly situated. In the words of the court of appeals (App. 137–138):

> [Plaintiffs] freely admit that they complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies. There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent. *So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.* (Emphasis added.)

2. Respondents' claim, that the mere existence of such an intelligence operation generates a chill on the exercise of First Amendment rights of others who wish to attend public gatherings without being observed by Army personnel, is not enough itself to satisfy the requirement of justiciability. This is the import of *United Public Workers* v. *Mitchell, supra*. There, as noted by the court below in *National Student Association* v. *Hershey*, 412 F. 2d 1103, 1114, federal employees challenging the Hatch Act "had plausi-

bly complained of a veritable freezing effect on some of their political activities, which lie at the very core of the First Amendment's intended protection." In holding that their claims were nonjusticiable, this Court stated (330 U.S. at 91): "No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and regulations."

It has, of course, long been recognized that the mere existence of a statute, regulation or articulated policy, even if the latter apparently is facially invalid, is not alone adequate basis for judicial intervention. See, *e.g., Alabama State Federation of Labor* v. *McAdory, supra*; *Watson* v. *Buck,* 313 U.S. 387; *National Student Association* v. *Hershey, supra,* 412 F. 2d at 1110. Courts "have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional." *Frothingham* v. *Mellon,* 262 U.S. 447, 488. The same rule is applicable to other types of governmental action. The courts are not a banc of grand censors of governmental policy. Their important function is narrower in scope, to decide actual controversies brought before them by parties truly affected by governmental action. Ours is a system of separated powers. "To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly before the courts" (*ibid.*) Those who enact and implement the laws are no less sworn than those who adjudicate legal rights under them to uphold the Constitution of

the United States. *Missouri, Kansas & Texas Ry Co.* v. *May,* 194 U.S. 267, 270; see also *United States* v. *Butler,* 297 U.S. 1, 87 (Stone, Brandeis and Cardozo, JJ., dissenting).

The "Case" and "Controversy" language in Article III provides a purposeful and effective limitation on the judicial function; it "implements the separation of powers prescribed by the Constitution * * *." *Flast* v. *Cohen,* 392 U.S. at 96; *Communist Party of the United States* v. *Subversive Activities Board,* 367 US. 1, 71–72. Action by the President and the Congress, whether touching on First Amendment rights or otherwise, is subject to judicial scrutiny only when "presented in the context of a specific, live grievance." *Golden* v. *Zwickler,* 394 U.S. 103, 110. Federal courts have not been given a roving commission to inquire generally into activities of the two other Branches of the Government. To the contrary, "[i]t would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interference upon the other." *United Public Workers* v. *Mitchell, supra,* 330 U.S. at 90.

Viewed in this context, respondents' formalistic claim of chilling effect is not ripe for determination. All that is before the Court is a general objection to the "*present existence*" (App. 139; emphasis in original) of government activity, purportedly overbroad in scope, because of its alleged chilling effect on other (and undesignated) members of the public at large.

There is no specific threat or imposition of legal or criminal sanctions directed against an ascertainable individual or group.[21] Missing also is any allegation that these individual plaintiffs, or members of the complaining associations, have been compelled to disclose political beliefs or ideas.[22] And respondents admit that this is not a case based on the past misuse of collected information (App. 151), or any threat to them of future publication by the Army (App. 139). Compare *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D. D.C.).[23]

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[21] Compare, *e.g.*, *United States* v. *Robel*, 389 U.S. 258 (criminal prosecution or loss of employment); *Dombrowski* v. *Pfister*, 380 U.S. 479 (criminal prosecution); *NAACP* v. *Button*, 371 U.S. 415 (criminal prosecution, disbarment); *National Student Association* v. *Hershey*, *supra* (draft reclassification).

[22] Compare, *e.g.*, *Lamont* v. *Postmaster General*, 381 U.S. 301 (compelling an affirmative request for mail held by the Post Office as communist propaganda); *Talley* v. *California*, 362 U.S. 60 (requiring identity on political handbills); *NAACP* v. *Alabama*, 357 U.S. 449 (requiring filing of membership lists); *Sweezy* v. *New Hampshire*, 354 U.S. 234, and *Watkins* v. *United States*, 354 U.S. 178 (compelling testimony).

[23] Even if respondents' suit were grounded on the fear of future misuse of the information in the hands of the Army, it would suffer from the lack of "sufficient immediacy and reality." *Golden* v. *Zwickler*, *supra*, 394 U.S. at 108, 110; *Davis* v. *Ichord*, *supra*, 442 F.2d 1215–1216. As we have pointed out (*supra* pp. 10–11), except for copies or print outs retained solely for purposes of this litigation, the computer data banks and identification lists have been destroyed. As the dissent below observed (App. 152): "There is nothing more here than a highly abstract claim based on an imaginary fear that governmental power to collect information for a valid purpose will be misused for an *improper* purpose. Similar fears might exist with respect to any government power. All power is susceptible of misuse, but that truism when coupled with unfounded fear alone is not sufficient to make out a case for judicial jurisdiction" (emphasis in original).

Contrary to the conclusion of the court of appeals (App. 138–141), this case is thus fundamentally different from the other cases in which federal courts have entertained claims based upon a chill to First Amendment rights. In each of those instances, there was "the beneficial focus afforded by adversary argument trained upon a factual dispute." *National Student Association* v. *Hershey, supra,* 412 F. 2d at 1114–1115. Here, by contrast, the rights sought to be vindicated are those of the general public, or at least of all members of the public who are politically active. Cf. *Frothingham* v. *Mellon, supra,* 262 U.S. at 488; *Flast* v. *Cohen, supra,* 392 U.S. at 106. That, we submit, is not enough.

To be sure, "a plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." *National Student Association* v. *Hershey, supra,* 412 F. 2d at 1110 and n. 19; *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519, 523–524 (C.A. D.C.). But, a judicial forum should not be made available to anyone who makes an allegation of general injury to the public (though not to himself) as a basis for protesting the existence of federal programs to which he may personally object. The proper focus of the judicial function always has been upon the actual impact of particularized government action on the rights of an ascertainable individual or group. There is nothing in the chilling effect doctrine, that alters this perspective. See, *e.g., Dombrowski* v. *Pfister, supra.* Indeed, precisely because an injury in the form of chilling effect

is by nature indirect, the frame of reference in that area should remain narrow in the traditional sense. For, "[t]o permit adjudication of a legal question or dispute solely on account of its chill is in effect to concede that the substantive issues, apart from the chill are themselves not ripe for adjudication." *National Student Association* v. *Hershey, supra,* 412 F. 2d at 1114–1115.

Here, those factors going beyond the "mere existence" of a statute, regulation or articulated policy, which the federal courts have heretofore looked to as generating a particular chill on identifiable plaintiffs, are absent. The constitutional issue in this case remains unfocussed; it is clouded further by admitted subtleties described by respondents below (App. 151) as "a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the [Army's] civilian intelligence network" (emphasis in original). In these circumstances, we do not believe "there exists a controversy between the parties with such immediacy and presently adversary character as to require its adjudication." *Davis* v. *Ichord, supra,* 442 F. 2d at 1211;[24] see also *Golden* v. *Zwickler,*

[24] The majority in the instant case distinguished *Davis* on the ground that the "source of the chill" in *Davis* was not the Army, but was a civilian investigative agency. Where the investigation or surveillance is performed by the military, it concluded (App. 145), there is a greater likelihood that the surveillance activity will have a "chilling effect," since "the military is not accustomed to operating within the restrictions of the law and the processes of the courts." Even if that statement were sound, however—and we think it is not—the argument sug-

supra, 394 U.S. 108, 110; *Maryland Casualty Co.* v. *Pacific Co.*, 312 U.S. 270, 273.

If, as the court below stated in *National Student Association* v. *Hershey, supra*, 412 F. 2d at 1111, this Court in *United Public Workers* v. *Mitchel, supra*, "spread the justiciability question along a continuum ranging between 'a general threat by officials to enforce those laws which they are charged to administer' and 'a direct threat of punishment against a named [party] * * * for a completed act,'" the instant case, must be placed near the "general" pole of non-justiciability. It is, we think, no more ripe for judicial determination than were the claims of chill based on a decision by the State of California to prosecute under its Criminal Syndicalism Act, which this Court declined to entertain last Term in *Younger* v. *Harris*, 401 U.S. 37, 42. See also *Samuels* v. *Mackey*, 401 U.S. 66; *Boyle* v. *Landry*, 401 U.S. 77; *Dyson* v. *Stein*, 401 U.S. 200; compare *Perez* v. *Ledesma*, 401 U.S. 82.

Admittedly, as the court below noted (App. 139–141 n. 17), this Court's abstention from reviewing the First Amendment claims in *Younger* and the related cases rested on principles of federalism. But that does not make those decisions wholly inapposite here. It is no more appropriate for the federal courts to interfere with the actions of the Executive or Legislative

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gests that the proper course is to await a case presenting concrete evidence of unlawful inhibitory action by the military, or a real threat of misuse of information; the issues should not now be adjudicated in a case which presents only abstract legal issues involving, at best, the speculative impairment of constitutional rights.

Branches in the absence of a clearly defined controversy between parties asserting specific, identifiable, and conflicting interests (see *United Public Workers* v. *Mitchell, supra,* 330 U.S. at 90–91) than for them to intercede prematurely in state matters when presented only with claims grounded in "imaginary [and] speculative" fears (*Younger* v. *Harris, supra,* 401 U.S. at 42). When the federal judicial power is invoked under the "Cases" or "Controversies" language in Article III, considerations not unlike those that sustain the requirements of federalism, require more than the vague assertions made in this case, which, as accurately noted by the dissent below (App. 152), involve at best "indefinite claims of highly visionary apprehensions that are admittedly based in abstractions which cannot be comprehended, or are beyond human experience or understanding * * *." See, *e.g., Davis* v. *Ichord, supra; Lampkin* v. *Connor,* 360 F. 2d 505 (C.A.D.C.); *American Dietaids Co.* v. *Celebrezze,* 317 F. 2d 658 (C.A. 2).

3. Indeed, if the judicial power may be invoked by a claim that First Amendment rights of other members of the general public will be chilled by the mere existence of a federal program of "unknown" scope or purpose, it is difficult to see where the line of justiciability can be drawn. May not some members of the public feel an official breath of cold air from the mere existence of the Secret Service, the Federal Bureau of Investigation and other law enforcement agencies, for example? "In view of the range of statutes, regulations and policies which arguably chill

protected expression" (*National Student Association* v. *Hershey, supra,* 412 F. 2d at 1114), treating the present claim as justiciable would, in essence, "convert the courts into de facto Councils of Revision over a substantial body of legislative and executive rules, ensuring immediate judicial review without regard to the actual application of the rules in practice" (*ibid.*). That result is precisely what the framers of the Constitution sought to avoid by confining the federal judicial power to "Cases" or "Controversies." See 1 Farrand, *The Records of the Federal Convention of 1787* (1911) at 21, 97–98, 108–110, 138–140; 2 Farrand, *op. cit., supra,* at 73–80. It is a consequence that this Court has consistently been careful to guard against throughout its history. See, *e.g.,* C. Wright, *Federal Courts* 34–36, and cases there cited. The Judiciary should not now embark on a new, unchartered course, that will take it into what have traditionally been viewed as Executive and Legislative waters, based only on the broad allegations of those who "[allege] a First Amendment chilling effect and [shiver] in court * * *" (*National Student Association* v. *Hershey, supra,* 412 F. 2d at 1114).

4. This does not mean that action of the Executive Branch goes unchecked until it can properly be brought before the federal courts. Executive programs are established pursuant to legislative authorization; before any such program becomes operative, two other Branches of the government, not insensitive to constitutional limitation, have at least implicitly found it agreeable to the Constitution. To paraphrase Justice

Holmes' comment in *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270: "[I]t must be remembered that [those Branches] are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." See also *United States* v. *Butler*, 297 U.S. 1, 87 (Stone, Brandeis and Cardozo, JJ., dissenting).

It has, of course, long been recognized that Congress, no less than the federal courts, shares an equal responsibility to supervise executive conduct prescribed by federal statute. Thus, contrary to the position of the court of appeals (App. 142), the fact that here "there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action * * *" is not dispositive. The Army is not a mere interloper in the civil disturbance field. Its mission there is specifically authorized by statute. Congress has provided that the President, upon request of any state legislature or governor, may use such of the armed forces as he deems necessary to suppress any insurrection or domestic violence against a state government. 10 U.S.C. 331–333.[25] The President's principal cabinet officer on matters of defense, the Secretary of Defense, has issued a directive (DOD Directive No. 3025.12 (June 8, 1968); 32 C.F.R. 187.1 *et seq.*) establishing uniform policies in

[25] In 1968, the President acted pursuant to that authority on three occasions; Executive Orders 11403 (April 5, 1968), 11404 (April 7, 1968) and 11405 (April 7, 1968); 3 C.F.R. (1968 Comp.) 107–110.

the use of military and civilian personnel, facilities, equipment or supplies during civil disturbances.[26]

For the Army to operate effectively under the authority and responsibility given to it by 10 U.S.C. 331–333, certain intelligence information obviously is needed. As the court of appeals recognized (App. 137), "[n]o logical argument can be made for compelling the military to use *blind* force" (emphasis in original). Accordingly, one of the enumerated responsibilities of the Secretary of the Army under DOD Directive No. 3025.12 is to "provide essential planning, operational and intelligence data to the National Military Command Center and the military service command centers on a timely basis to insure that * * * [the proper authorities] are adequately informed" (32 C.F.R. 187.6).

The Army domestic surveillance system involved here was, as we noted earlier, established in direct response to the wave of civil disorder and violence that swept this country in the late 1960's (App. 87–91). As the court below pointed out (App. 135–136): "Many violent protests were aimed directly at military functions and installations themselves, as in ransacking Selective Service offices, barring troops and supply trains by prostrate bodies on the tracks, unlawful attempts to enter military bases or demonstrations thereon, and harassment of defense-oriented

[26] The Directive designates the Secretary of the Army as the "Executive Agent for the Department of Defense in all matters pertaining to the planning for, and the deployment and employment of military resources in the event of, civil disturbances" (32 C.F.R. 187.6).

businesses." Many others, of course, were directed elsewhere. In order to control these civil disturbances, local and state authorities found it necessary to call for assistance from federal troops with increasing frequency during this period; "the Army and the National Guard [were] called upon to act to preserve domestic peace against violent protests leading to civil disorders, a role for the military which was not unforeseen in our Constitution" (App. 135).

To meet this situation, the Army engaged in civil disturbance intelligence activities "directed primarily at ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act" (App. 70). Cf. *Report of the National Advisory Commission on Civil Disorders,* p. 269 (Supp. March 1, 1968). Contrary to the suggestion in Mr. Pyle's article (App. 28), the Army's purpose was not to "distribute and store detailed reports on the political beliefs and actions of individuals and groups." Rather, the military attended public gatherings with a potential for civil disorder for reasons similar to those noted in *Anderson* v. *Sills,* 56 N.J. 210, 222, 265 A. 2d 678, 684–685 (Sup. Ct. N.J.), for local police surveillance in similar situations:

> In the current scene, the preventive role requires an awareness of group tensions and preparations to head off disasters as well as to deal with them if they appear. To that end the police [or the Army] must know what forces exist, what groups or organizations could be

> enmeshed in public disorders. This is not to ask the police [or the Army] to decide which are "good" and which are "bad." In terms of civil disorders, their respective virtues are irrelevant, for a group is of equal concern to the police [or the Army] whether it is potentially the victim or the aggressor. The police interest [and the Army interest] is in the explosive possibilities and not in the merits of the colliding philosophies. * * *

If, in performing this essential intelligence function, the Army, as respondents claim, exceeded the authority granted to it by Congress to carry out its civil disturbance mission, there is here an available forum outside the courts in which the public can air its general grievances. The Legislative Branch is particularly well suited to act as a check on such activity of the Executive Branch that sweeps too broadly. Indeed, as the dissent below pointed out (App. 154 n. 5), when dealing with issues of the sort presented here, which are "tremendously complex" and involve "broad questions of both law and policy," their resolution "is much better undertaken, at this juncture, by the Congress than it is by [the courts]."

Nor are we talking here in terms of theoretical possibilities. "[J]udicial notice may be taken that Congress is presently conducting public hearings upon the policy questions involved in this very area where the named plaintiffs here seek judicial intrusion"

(App. 154).[27] Partially as a response to congressional concern over the scope of the Army's civilian intelligence operations, the military domestic surveillance system has been cut back sharply. Not only has the bulk of information collected in the late 1960's been destroyed, but current intelligence operations in this area are now carefully restricted to specialized situations where civil disorder appears imminent; Army field personnel are generally no longer to prepare and submit to Intelligence Command "spot reports" on their surveillance activity (see pp. 9–10 *supra*; and see Appendix B; *infra*, pp. 47–51).

Thus, even if it is unlikely "that a better opportunity will later arise to test the constitutionality of the Army's action" (App. 142), that is perhaps a sufficient reason for the judicial branch to stay its hand, for its means that judicial intervention is in fact not necessary to protect those on whose behalf these respondents have purported to sue. The challenged activity of the Executive Branch has already been reviewed. Congress, which shares a co-equal obligation to supervise the performance of executive functions, has undertaken to examine extensively the Army's civil disturbance intelligence operation to determine whether it exceeds the authority conferred by statute. That body is particularly well suited to the task. In the absence of a clearly defined controversy presented

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[27] The Senate Judiciary Subcommittee on Constitutional Rights has already held extensive hearings on Computers, Data Banks and the Bill of Rights. See 117 Cong. Rec. S. 985 (daily ed., February 8, 1971). We have been advised that these hearings are now being printed.

by persons who assert a specific, identifiable, and direct injury to themselves, there is no need for the federal courts, further removed from the "impact of actuality" (App. 154 n. 5), to duplicate that effort.

B. RESPONDENTS HAVE NO STANDING TO MAINTAIN THIS SUIT

Although "[s]tanding is an aspect of justiciability" (*Flast* v. *Cohen, supra,* 392 U.S. 98), analytically the focal point of discussion in this area is on the concept of personal injury and not on the concept of ripeness. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated" (*id.* at 99).

In order to have standing to challenge the government activity questioned here, plaintiffs must demonstrate "a personal stake in the outcome of the controversy." *Baker* v. *Carr,* 369 U.S. 186, 204. "[L]itigants who have not been harmed or threatened with immediate harm by administrative action have no standing to attack it." *Danville Tobacco Association* v. *Freeman,* 351 F. 2d 832, 833 (C.A.D.C.). Consequently, as this Court stated in *Association of Data Processing Service* v. *Camp,* 397 U.S. 150, 152, an essential requirement of standing is that "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."

1. If, as the majority below found (App. 139), the harm, or threat of harm, in this case is measured in terms of the *"present inhibiting effect"* on the exercise of First Amendment freedoms of speech and as-

sociation, generated solely by the *"present existence of this* [military surveillance] *system,"* plaintiffs are not proper parties to request adjudication of the constitutional issues raised. By their own admission in the court below (App. 148), they "are *not people, obviously, who are cowed and chilled* * * * " (emphasis in original). Rather, they have come forward to assert the present inhibitory effect of such a system "to represent millions of Americans not nearly as forward, as courageous, as willing as them to open themselves up to public investigation and public scrutiny" (*ibid.*).

Thus, plaintiffs do not seek to protect their own personal (cf. *Dombrowski* v. *Pfister, supra*) or associational interests (see *NAACP* v. *Alabama,* 357 U.S. 449, 459).[28] They admit—indeed they assert—that their attendance and speech (or that of their membership) at future public gatherings will not be deterred by the possibility of Army surveillance. They come into court instead, to use the words they used in the court of appeals, as self-appointed "private attorneys general" (C.A.Br. p. 40), acting on behalf of "millions of Americans" (App. 148).

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[28] In addition to its representational interests, an organization could have interests of its own which might "be injured in fact"—an interest in uncoerced membership (*NAACP* v. *Alabama, supra*), financial or proprietary interests (*Pierce* v. *Society of Sisters*, 268 U.S. 510), or the like. But the named associations in the instant case have made no such claim of injury, either to themselves or to their membership.

The concept of "private attorneys general" is one that has undergone significant expansion in recent years. See, *e.g.*, Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 272–274. That expansion has come, however, essentially from Congress and not from the courts. It is generally recognized that Congress may confer standing on a limited class of persons—such as competitors hurt by a grant of a license, or consumers hurt by a price-fixing order—"to bring a suit to prevent action by an officer in violation of his statutory powers * * * (*Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (C.A. 2), vacated for mootness, 320 U.S. 707). Leading cases in the courts of appeals which are often cited for expanding the law of standing are characterized by just such specific congressional judgments. See, *e.g.*, *Scenic Hudson Preservation Conf.* v. *Federal Power Commission*, 354 F. 2d 608, 615 (C.A. 2) (statute requires consideration of environmental and recreational factors, and permits review at behest of any "aggrieved" party); *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F. 2d 994 (C.A.D.C.) (statute requires consideration of service to listening public, and permits review at behest of any "aggrieved" party).

Where Congress has seen fit to take such action, however, it has conferred a right to sue on a specified class of persons who have suffered a particular and ascertainable injury as a result of the challenged of-

ficial action.[29] When acting without the direction of Congress, the courts are, and should be, much more hesitant to extend standing to new groups of suitors; certainly as a minimal requirement they should adhere to the criterion of particular and ascertainable injury that has guided Congress.

In short, one should not be permitted to obtain judicial adjudication of personal protests against a governmental program merely on the basis of a claim of generalized injury to "millions of Americans." Some "logical nexus between the status asserted [by the litigant] and the claim sought to be adjudicated" is necessary. *Flast* v. *Cohen, supra,* 392 U.S. at 102. Even when suing in the self-appointed capacity of "private attorneys general," plaintiffs must demonstrate something more than "merely a general interest common to all members of the public." *Ex parte Levitt,* 302 U.S. 633, 634. The group represented must be specifically identified by an alleged "distinctive and discriminating harm" (*Barlow* v. *Collins,* 397 U.S. 159, 172 n. 5; Brennan, J., concurring and dissenting) that sets it apart from the public at large. See *e.g., Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1; *Investment Co. Institute* v. *Camp,* 401 U.S. 617. It is not enough to allege, as respondents have done here, merely a "generalized grievance about the conduct

[29] See, *e.g.,* Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a) ("person aggrieved"); Section 24(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79x (a) (same); Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b) (same); Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1) (persons "adversely affected"); Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20) ("any party in interest").

of government" (*Flast* v. *Cohen, supra,* 392 U.S. at 106). As the District of Columbia Circuit recently pointed out in *Davis* v. *Ichord,* 442 F. 2d 1207, 1216 n. 19:

> There may be cases where injury that is done or immediately threatened to some members of a defined group of which plaintiff is a party may be sufficient to give rise to a chilling effect upon the plaintiff; but the mere bringing of an action as a class action on behalf of "all persons who seek to exercise freely their rights guaranteed in the First Amendment" does not avoid the requirement of the specificity necessary to state a case or controversy.[30]

In the latter situation—which accurately describes what respondents have done here—where the parties themselves have suffered no injury and do not occupy an adversary position sufficient to invoke a federal court's jurisdiction, the claim of representation of a class of "millions of Americans" cannot provide the necessary nexus to the constitutional infringement al-

[30] In *Davis,* plaintiffs asserted, *inter alia,* that a House Committee had compiled thousands of dossiers on political protestors which it had made available, unlawfully, to both government and private groups for the purpose of harassing and intimidating members of the class plaintiffs claimed to represent. The court of appeals (Judge Leventhal concurring on separate grounds), in holding that the controversy was not justiciable and that plaintiffs had no standing to seek injunctive relief against further use by the House Committee of the dossiers, stressed that "[t]he Supplemental Complaint * * * seeks to bring appellees into conflict with appellants only by alleging the use or threat of use of dossiers in a manner harmful not to appellants but to others, in the exercise of their constitutional rights * * *." (442 F. 2d at 1212)

leged to enable them to maintain the suit. See, *e.g.*, *Troutman* v. *Shriver*, 417 F. 2d 171, 174 (C.A. 5), certiorari denied, 397 U.S. 923; *Velvel* v. *Nixon*, 415 F. 2d 236, 238 (C.A. 10), certiorari denied, 396 U.S. 1042; *Watkins* v. *Chicago Housing Authority*, 406 F. 2d 1234, 1235–1236 (C.A. 7); *Kansas City, Mo.* v. *Williams*, 205 F. 2d 47, 51–52 (C.A. 8), certiorari denied, 346 U.S. 826; and cf. *Bailey* v. *Patterson*, 369 U.S. 31, 32–33.

2. Nor do respondents stand on firmer footing if their complaint, despite their claim to the contrary (App. 139), is deemed to be based on the possibility of future injury (App. 149 n. 1). Perhaps most, if not all, of the respondents "have been the subject of Army surveillance reports and their names have appeared in the Army's records" (App. 140 n. 17). But they do not complain that the information was obtained by improper means.[31] The reports all relate to "public activities of individuals who *publicly* participate in gatherings and demonstrations which tend to civil disorders and in related activities" (App. 149; emphasis in original).

As pointed out in the dissenting opinion below (App. 150–151), there are a number of proper uses to which such information can legitimately be put by the military. While it is perhaps possible that the Army

[31] As already noted, it is not alleged that the Army has conducted surveillance of wholly private activity (App. 149–150 n. 2). Compare *Local 309, United Furniture Workers of America* v. *Gates*, 75 F. Supp. 620 (N.D. Ind.).

could in the future misuse the information,[32] respondents concededly (App. 149 n. 1) "have alleged no present use, preparation for use or selectivity in gathering information by the Army which would reasonably justify such fears" (compare *Lamont* v. *Postmaster General,* 381 U.S. 301; *Shelton* v. *Tucker,* 364 U.S. 479, 486 n. 7; *Hentoff* v. *Ichord,* 318 F. Supp. 1175 (D.D.C.)). The unfounded fear of unlikely but remotely conceivable misuses of information obtained about respondents does not present a sufficient "personal stake in the outcome of the controversy" (*Baker* v. *Carr,* 369 U.S. 186, 204) to confer standing on these litigants. The point was well stated in *Davis* v. *Ichord, supra,* 442 F. 2d at 1215–1216:

> Nor does the possible use of the information in the Committee's files give rise to an Article III case or controversy between these parties. It is not claimed that any non-legislative use of the Committee's files is authorized by the Committee's mandate, no matter how broadly construed by appellants; and appellants do not allege except as we have indicated that the files have been or will be used to their personal detriment. We think in a frontal attack of this sort upon the Committee some existing or threatened

[32] Since such information has largely been destroyed (see *supra* p. 10), and the Army is presently in the process of eliminating all such information from its USAIRR files (*supra* n. 11), the possibility of misuse is remote. The Army has retained only one copy of the "identification list," and a single copy of each computer data bank that was destroyed, for purposes of this litigation.

adverse action by the present Committee more directly associated with the suitor must be alleged.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and respondents' complaint should be dismissed.

Respectfully submitted.

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JANUARY 1972.

APPENDIX A

Section 331 of Title 10, United States Code, provides:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Section 332 of Title 10, United States Code, provides:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

Section 333 of Title 10, United States Code, provides:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

APPENDIX B

DEPARTMENT OF THE ARMY, OFFICE OF THE ADJUTANT GENERAL, WASHINGTON, D.C. 20310

AGDA (M) (25 May 70) ACSI-CICD 9 JUNE 1970.
Subject: Collection, Reporting, Processing, and Storage of Civil Disturbance Information.

(See Distribution)

1. PURPOSE. This letter establishes Department of the Army policy regarding the collection, reporting, processing, and storage of civil disturbance information. It is applicable within the Continental United States, the States of Alaska and Hawaii, and Puerto Rico. It applies to all Army commands within those geographic areas.

2. DEFINITIONS.

a. Civil disturbance—A situation in which a civil jurisdiction is required to apply a greater than usual degree of police enforcement in order to insure the maintenance of law and order.

b. Civil jurisdiction—A town, city, county, or State; a legal corporate government within the Continental United States, Alaska, Hawaii, or Puerto Rico other than the Federal Government or its departments and agencies.

c. Collection—For purposes of this policy, the acquisition of information in any manner, to include direct observation, liaison with official agencies, or solicitation from official or unofficial sources.

d. Law and order—A condition in which a reasonable degree of the normal operations of a civil jurisdiction is possible.

e. Police enforcement—That force available to a civil jurisdiction in order to insure law and order, such as a city police department, a county sheriff's office, State police, or National Guard in State service.

f. Processing—The collation, evaluation, and analysis of raw information in order to produce finished intelligence.

g. Reporting—For purposes of this policy, communicating information to another person or organization, whether orally, mechanically, or electrically.

h. Storage—For purposes of this policy, the retention of information in any way, to include card files, dossiers, folders, computers, or punch cards.

3. GENERAL.

a. Public order is the responsibility of local and State governments and Federal civilian agencies. The Attorney General is the chief Executive Branch officer responsible for coordination of all Federal Government activities related to civil disturbances. Military forces are responsible for action only when the President has determined, in accordance with Chapter 15, Title 10, U.S. Code, that the situation is beyond the capability of civilian agencies to control.

b. The investigative jurisdiction of the Army with regard to espionage, sabotage, and subversion is in accordance with Executive Order 10450, dated 27 April 1953. It is delineated in AR 381–115, 2 July 1969, and is limited to:

(1) The investigation and disposal of all cases in these categories involving active and retired military personnel of the Army.

(2) The investigation and disposal of all cases in these categories of civilian employees of the Army outside the United States and its possessions.

(3) The disposal of cases on civilian employees of the Army inside the United States and its possessions

c. The Department of the Army relies upon the Department of Justice at the national level to furnish civil disturbance threat information required to support planning throughout the Army for military civil disturbance needs.

d. The Department of the Army relies upon the Department of Justice at the national level to furnish early warning of civil disturbance situations which may exceed the capabilities for control by local and State authorities.

e. Under no circumstances will the Army acquire, report, process, or store civil disturbance information on civilian individuals or organizations whose activities cannot, in a reasonably direct manner, be related to a distinct threat of civil disturbance exceeding the law enforcement capabilities of local and State authorities, except as authorized in paragraphs 8 and 9d.

4. COLLECTION.

a. Army intelligence resources will not be used for the collection of civil disturbance information until the Director for Civil Disturbance Planning and Operations, or the Commander in Chief, Atlantic (CINCLANT) in the case of Puerto Rico only, has made a determination that there is a distinct threat of civil disturbance beyond the capability of local and State authorities to control.

b. Army Military Intelligence elements possessing counterintelligence resources will maintain the capability to collect civil disturbance threat information during a period in which there is a distinct threat of, or actual, civil disturbance requiring the use of Federal military forces.

c. Within the District of Columbia, the criterion is a distinct threat of civil disturbance beyond the capability of the Metropolitan Police to control.

d. Civil disturbance information collection capability of Army elements in the Continental United States, Alaska, or Hawaii will not be employed except on Department of the Army order or, in the case of Puerto Rico, on order of CINCLANT.

e. On activation by the Department of the Army, or CINCLANT for Puerto Rico, Military Intelligence elements possessing counterintelligence capability will:

(1) Establish and maintain liaison with appropriate local, State, and Federal authorities.

(2) Through liaison, collect civil disturbance information concerning incidents, general situation, and estimate of civil authorities as to their continued capability to control the situation.

(3) Report collection results to Department of the Army, ATTN: ACSI–LA, and DCDPO. In Puerto Rico only, report results to CINCLANT with information copies to DA, ATTN: ACSI–LA, and DCDPO.

(4) Keep appropriate commanders informed.

(5) Provide intelligence support to the Personal Liaison Officer, Chief of Staff, Army, and the Task Force Commander on arrival in the affected area.

(6) Recommend methods of overt collection, other than liaison, if required, to Department of the Army for approval.

f. Army Military Intelligence elements will employ methods of collection other than liaison only on order of Department of the Army.

g. Covert agent operations will not be used to obtain civil disturbance information on individuals or organizations without the concurrence of the Federal Bureau of Investigation and the specific approval of each operation by the Under Secretary of the Army.

h. Unsolicited Sources.

(1) So-called walk-in sources who volunteer civil disturbance information to Army elements will be referred to appropriate local police or local offices of the Federal Bureau of Investigation. If the source refuses such referral the information will be obtained and immediately furnished to the proper office.

(2) Information received from anonymous telephone callers or written will be referred as indicated in paragraph 4h(1) above.

5. REPORTING.

a. Army elements will maintain the capability of reporting civil disturbance information.

b. Civil disturbance information reporting will be activated only on Department of the Army order. In Puerto Rico, reporting will be activated only on order of CINCLANT.

6. PROCESSING.

a. OACSI, DA, has the sole responsibility for processing civil disturbance information in accordance with the definition outlined in paragraph 2 above at all times when Federal troops are not actually placed on standby or committed.

b. When the Director of Civil Disturbance Planning and Operations directs that Federal troops be placed on standby or committed to assist in restoring order, those Army elements involved will also be responsible for processing civil disturbance information in support of their local planning.

7. DISSEMINATION. Analyzed reports will be furnished to appropriate major Army commands in CONUS, Alaska, Hawaii, and Puerto Rico, when it appears that a civil disturbance poses a distinct threat beyond the capabilities of local and State authorities to control.

8. PLANNING. Civil disturbance plans and supporting materials will not include listings of organizations and personalities not affiliated with the Department of Defense. Exceptions to this policy are:

a. Listings of local, State, and Federal officials whose duties include responsibilities related to control of civil disturbances may be compiled and maintained.

b. Appropriate data on vital public and commercial installations/facilities or private businesses and facilities which are attractive targets for persons or groups engaged in civil disorder may be compiled and maintained.

9. STORAGE.

a. Army elements will be prepared to store civil disturbance information during a period in which there is a distinct threat of, or an actual, civil disturbance requiring the use of Federal military forces.

b. Adverse civil disturbance information relating to persons or organizations within the Continental United States, Alaska, Hawaii, or Puerto Rico, will not be stored except on order of Department of the Army.

c. Spot reports generated by activation of civil disturbance information collection will be destroyed within 60 days of the termination of the situation to which they refer.

d. After-action reports, where required for clarity, may contain names of individuals or organizations that were directly involved in the civil disturbance being reported. Inclusion of names of organizations and individuals will be kept to the absolute minimum for the purpose of the report.

e. Upon termination of a civil disturbance situation, the nature and extent of all accumulated files other than spot reports and afteraction reports will be re-

ported to Department of the Army, ATTN: ACSI–CIC, with recommendation for destruction or release to the Department of Justice.

f. Army elements will be prepared, on Department of the Army order, to destroy accumulated files or forward them to Department of the Army, ATTN: ACSI–CIC, for release to Department of Justice.

g. Computerized data banks for storage of civil disturbance information will not be instituted or retained without the approval of the Chief of Staff and the Secretary of the Army.

10. The collection, reporting, processing, and storage of information related to Army personnel security programs, counterintelligence operations, and special collection requirements related to direct threats to Army personnel, installations, or materiel are not affected by this letter.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/ Robert E. Lynch

/s/ ROBERT E. LYNCH,

Colonel, AGC, Acting The Adjutant General.

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APPENDIX C

DEPARTMENT OF THE ARMY, WASHINGTON, D.C.
6 MARCH, 1970.

MEMORANDUM FOR THE CHIEF OF STAFF UNITED STATES ARMY

Subject: Restrictions on Intelligence Operations Involving Civilian Activities.

I appreciate the prompt and vigorous actions taken by General Palmer, General McCaffrey and General McChristian to eliminate the computer data banks, containing information on civilians, which were identified during the recent review of Army civil disturbance intelligence activities. The actions taken are a step toward limiting Army civil disturbance intelligence activities strictly to activities which have a clear potential for developing into a major disturbance beyond the capability of local and state law enforcement officials and the state National Guard.

I understand that General McCaffrey and General McChristian are reviewing still other measures, such as reductions in direct overt observations of incidents in progress, liaison with local authorities, and related "spot reporting" activities. The Under Secretary and the General Counsel will continue to work with your representatives to assure that appropriate further actions are taken in these other areas.

With respect to computerized data bank operations, it seems clear that the dangers of such systems require strong, centralized control over their creation and use. Accordingly, confirming the verbal policy which I stated to the General Counsel in connection

with responding to recent Congressional inquiries on the subject, no such intelligence data bank operations relating to civil disturbance or other activities involving civilians not affiliated with the Department of Defense should be instituted without the approval of the Secretary of the Army and the Chief of Staff. In view of the sensitivity of such operations, approvals will not be granted without consultations with the concerned committees of Congress.

In order to insure that no Army element in the United States is maintaining this type of system, I would appreciate your asking all commanders in CONUS, Alaska and Hawaii, down to the installation level to report whether their command has any form of computerized data bank relating to civilians or civilian aetivities, other than data banks dealing with routine administrative actions such as finance or personnel records involving Army personnel or employees. If a command has such a data bank, the data bank should be immediately destroyed, unless a report justifying its existence is submitted for approval as indicated above.

STANLEY R. RESOR,
Secretary of the Army.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

ARLO TATUM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF

Unitarian Universalist Association
Council for Christian Social Action, United Church of Christ
American Friends Service Committee
National Council of Churches of Christ

Amici on behalf of the respondents

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Amici on behalf of the respondents

INTEREST OF THE AMICI CURIAE

Unitarian Universalist Association

The Unitarian Universalist Association is a religious association established more than 200 years ago and incorporated under the laws of New Hampshire and New York. The

Association, in its constitution, "is empowered to, and shall devote its resources to and exercise its corporate powers for, religious, educational and charitable purposes." In accordance with these purposes, the Association, among other things, seeks "to cherish and spread the universal truths taught by the great prophets and teachers of humanity . . .; to affirm, defend and promote the supreme worth of every human personality, the dignity of man, and the use of the democratic method in human relationships;" and "to implement our vision of one world by striving for a world community founded on ideals of brotherhood, justice and peace."

The Association, its member churches and fellowships have long regarded the Constitution and the Bill of Rights as a bulwark of religious and civil liberty. Individual members, churches, and congregations of the Association have long believed that social action on issues of public concern is an important part of their religious and personal obligations. As a result, many congregations and individual members have actively exercised their rights of free expression and assembly under the Constitution with respect to the controversial public issues of our times. It was a matter of grave concern, therefore, to the Association, its churches, and members to discover that at least four churches and an undetermined number of individual members have been the subject of military investigation and surveillance. Because of its belief that such surveillance is alien to our form of government and foreign to a society of free men and women, the General Assembly of the Association on June 11, 1971, unanimously resolved to oppose such surveillance and to support efforts to bring it to a halt.

Council for Christian Social Action, United Church of Christ

The Council for Christian Social Action is a national instrumentality established by the United Church of Christ to "study the content of the gospel in its bearing on man in society, provide and publish information and literature on social issues, cooperate with . . . . appropriate bodies in making the implications of the gospel effective in society, and

formulate and promote a program of social education and action for the United Church of Christ." The United Church of Christ is a major American Protestant denomination of some 2,000,000 members, the union of the Congregational Christian churches and the Evangelical and Reformed Church.

Although the Council speaks only for itself, addressing both churches and the civil society in the interests of justice and mercy, on occasion it represents the broader convictions of the communion as expressed through pronouncements of its General Synods. This is the case in the Council's long-term promotion of civil liberties in American society and its opposition to all forces which deny rights of privacy and of association, suppress political participation, stifle dissent, or punish critics of national policy.

Thus the Council can also speak for the Fourth General Synod of its church, which called upon churchmen "as Christians and citizens" to safeguard the right of freedom of expression as guaranteed in the First Amendment of the Constitution of the United States, including the right within constitutional limits to express opposition or commendation to our government or to advocate peaceful change to alternative political and economic systems without being intimidated or harassed.

More recently, this church's Eighth General Synod, meeting in 1971, as part of its concern to enable U.S. power to serve humane ends and contribute to world peace, took as one of its prime objectives "to have the Instrumentalities, churches and members work to restrain the power of the Pentagon in probing into the private lives of American citizens."

American Friends Service Committee

The American Friends Service Committee is an independent, voluntary, privately-owned Quaker organization, founded in 1917, and active since that time in works of humanitarian relief and service, reconciliation between nations and peoples, public education about peace, and programs to overcome discrimination and oppression occasioned

by race, poverty and injustice. It has devoted major energy to opposing war, militarism and conscription and to assisting people who have suffered from their consequences.

On February 28, 1970, the press reported that the American Friends Service Committee was the subject of Army military intelligence files and that there had been military surveillance of the AFSC and individuals associated with it. Subsequent press and other public disclosures alleged that the surveillance had been indiscriminately directed at civilians engaged in legitimate anti-war, anti-draft and pro-civil rights activities. These disclosures had a disruptive effect on the peace education work of the AFSC and are believed to have discouraged some Americans, otherwise ready to participate publicly in activities related to U.S. war and draft policies and practices, from risking such official military surveillance.

On May 11, 1970, the AFSC wrote to the Secretary of the Army requesting factual information about the press statement and the Army authority for maintaining such files. The reply stated that under Army policy, the Army has no interest in investigating the AFSC because the national activities and goals of the AFSC do not constitute a threat to the Army's operations, property or personnel. But the Army further stated that "certain members" of the AFSC at the local level were and can be "of investigative interest" to the Army, and that, aside from any such individual files on "local members," the Army did maintain a file on the AFSC containing information and material "generally derived from other agencies and sources." We were informed that the file on the AFSC was examined to determine whether it could be retained under current policy and, in the words of the General Counsel's letter, "It could not be retained and was, therefore, destroyed." No proof of such destruction has been offered and no information has ever been given as to which individuals associated with the AFSC had been under surveillance and the subject of past or present files.

The American Friends Service Committee believes that American citizens must be accorded protection against the

silent and *subrosa* dissipation of their rights of privacy and against the invalidation or subversion of their rights of assembly, press, speech and dissent by means of secret or even brazen surveillance, data storage and information dissemination by the military authorities. The American Friends Service Committee seeks protection for itself and the American citizens associated with it against such military dangers.

National Council of Churches of Christ

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. It is governed by a General Board of 250 members chosen by the member denominations in proportion to their size and support. The General Board determines the policies of the organization through debate, amendment and adoption of carefully-prepared statements and resolutions brought to it by its subordinate program divisions.

Several of those policies have affirmed the rights of all persons to freedom of religion, speech, press and assembly without fear of intimidation, retribution or obloquy. It is in implementation of those policies that the National Council of Churches participates in this brief. An additional consideration is the fact that one of the plaintiffs which has been subjected to military surveillance, Clergy and Laymen Concerned About Vietnam, originated in one of the program units of the National Council and has since become an independent organization. Many of the leaders of the National Council are or have been active as individuals in that organization, and while no less concerned for the like rights of all, feel a special kinship for it and a resentment against military surveillance of persons whom they know and trust.

Permission is granted by both parties for the filing of this brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are:

Article I, section 8, relating to the legislative power over the armed forces, and especially the congressional powers "To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions;"

Article IV, section 4, which provides that:

> "The United States . . . shall protect each [state] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence;"

The First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statutory provisions, 10 United States Code 331-333 are set forth in Appendix A, pages 43-44, of the petitioner's brief.

Section 334, of title 10, U.S.C. reads as follows:

> *Proclamation to disperse.*
>
> Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

Section 1385, of title 18, U.S.C. reads as follows:

> *Use of Army and Air Force as possee comitatus.*
>
> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a possee comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

QUESTION FOR REVIEW

The writ of certiorari presents the following question: Do individuals and organizations not affiliated with the armed services present a justiciable issue under the First, Fourth, Fifth and Ninth Amendments when they allege that their rights of free expression, privacy and association have been infringed by unauthorized, unnecessary and indiscriminate military investigation of their political activities and personal lives?

STATEMENT[1]

Sometime in the 1960's, prompted by an increase in civil violence, the United States Government, acting through the armed forces and primarily the Army, began a massive program of investigation and surveillance[2] of the thoughts, habits, attitudes, political activities and associations of individual American citizens.[3] This Army program took the form of the development and maintenance of investigative files in manual and computerized systems. It was an expansion of

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[1]Because of the incomplete nature of the record before the Court, this statement is based in part on the investigations of the Constitutional Rights Subcommittee, United States Senate, from January, 1970, to present. The bulk of the Subcommittee's investigations has been printed. See Hearings on Federal Data Banks, Computers, and the Bill of Rights, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 92d Congress, 1st session, 1971. Hereinafter cited as "Hearings." Copies of these hearings are submitted separately as an appendix to this brief. Additional information is contained in various classified and unclassified documents which have been segregated for possible discovery proceedings in this litigation.

[2]Although popularly termed "surveillance", the military program has consisted of far more than the passive observation and recording of public events that this term might suggest.

[3]Surveillance of this type by the armed forces has been conducted with varying degrees of intensity ever since World War I.

pre-existing investigative operations of the armed forces, such as personal background investigations, and was in many aspects inseparable from these other functions. The program was ostensibly developed in connection with the increased use of the Army to put down civil violence. Although there is little evidence available to support the contention, it has been explained as an effort to "predict" situations in which the use of military force would be required.

At the height of the program in the late 1960's, thousands of agents of the United States Army Intelligence Command were involved. In addition, numerous other investigative personnel and other sources of military manpower from the Continental Army Command, the Navy and the Air Force were employed. According to Army documents, the responsibility of these investigators was to gather information on persons and organizations engaged in various activities associated with racial problems, antiwar, antidraft, and other controversial public issues. Intelligence activities have been conducted in public places, on college campuses, at high schools, in churches, and at private meetings. Persons subjected to this program have ranged from leaders of active organizations, to ordinary members, the curious and the passerby. Individuals expressing support or sympathy with subjects of the surveillance have also come under investigation. Subjects have included numerous Congressmen and United States Senators and family members of a Senator, state and local officials, a member of this Court, newspaper reporters, clergymen, and thousands of other Americans. Although no total number can be estimated, it is not an exaggeration to talk in terms of hundreds of thousands of individuals, organizations, events, and dossiers.

The information gathered on these citizens has included their participation or presence at political events, their political views, their relationships with other political activities, their travel, their family associations, finances, education, and other types of personal data. Once a person becomes the subject of investigation, the data gathered about him and his

activities is unlimited.[4] Information for the Army dossiers has been obtained by observation of public activities, by covert infiltration, by electronic devices, tape-recorders, cameras, and by videotape, as well as by requesting data from other governmental agencies and from private sources. The Army analyzed and attempted to categorize and label individuals according to their utterances and the way they exercised their rights of free speech, assembly, association, and petition.

The bulk of investigative activity by the Army's own personnel occurred at the field level. Agents collected information and filed "spot reports," "agent reports", and "summaries of investigation". Most of this data was forwarded up the chain of command but record copies were kept in data centers at every level of command. Manual files were maintained at every level. At least four and possibly more computer systems were employed to store, analyze, and retrieve the information collected. Many files were microfilmed and integrated with other files on persons who were suspected of violations of security and espionage laws. These were located at the headquarters of the Intelligence Command (Fort Holabird), the Continental Army (Fort Monroe), the Third Army Corps (Fort Hood), and in the Pentagon. More than one computer data bank was maintained in some of these locations.

Information gathered in this program and political analyses produced as part of it were indiscriminately shared and exchanged by the Army and were distributed to other military record systems, and to other federal; state, and local agencies maintaining investigative files. Although subsequent to the filing of this lawsuit, many of the Army computer systems and other collections of data were ordered destroyed, much of the data still exists in files maintained by the Department of the Army, the Defense Department, and the other federal, state, and local agencies to which it was

[4] *Hearings*, p. 384. Statement of Assistant Secretary of Defense Froehlke.

regularly sent. The Department of the Army has been unwilling or unable to ensure the complete elimination of the information collected under this program from its own and other governmental records.[5]

Examples of the type of organizations put under investigation include the following: The Southern Christian Leadership Conference, the National Association for the Advancement of Colored People, the State Rights Party, the Presbyterian Interracial Council of Chicago, the American Civil Liberties Union, Clergy and Laymen Concerned About Vietnam, the Congress of Racial Equality, the Mexican-American Youth Organization, National Organization for Women, Operation Breadbasket, United Christian Community Service, the Urban League, Young Americans for Freedom, SANE, Milwaukee United School Integration Committee, American Friends Service Committee and hundreds of others.[6]

This action was brought by a group of citizens and organizations challenging the constitutionality under the First, Fourth, Fifth and Ninth Amendments of intelligence activities conducted against them by the Department of Defense. They allege that military investigation of peaceful and lawful political activity by persons unconnected with the armed forces has infringed upon their ability to exercise constitutionally protected rights, and that it infringes the rights of others. They seek a declaratory judgment that such military activity is unconstitutional or otherwise illegal, injunctions

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[5]Letter from J. Fred Buzhardt, General Counsel, DOD, to Senator Sam J. Ervin, Jr., Chairman, Constitutional Rights Subcommittee, June 10, 1971. *Hearings*, pp. 1232, 1233, 1235.

[6]See "The Phoenix," Boston, Mass., October 27, 1971; and Dispatch News Service International release no. 218 for a more comprehensive list of organizations. These news stories are based on an army collection plan dated April 23, 1969. *Hearings*, pp. 1731-34. See also *Hearings*, pp. 184, 264-66 for examples of other individuals and organizations.

forbidding such activity in the future, and mandatory relief requiring the destruction of all information which resulted from the military program. The District Court dismissed the complaint on the government's motion without permitting a hearing on the request for a preliminary injunction. The Court of Appeals reversed and ordered further proceedings. This Court granted the government's application for a writ of certiorari over plaintiff's opposition.

The facts necessary to an informed consideration of the issues raised in the petition for certiorari do not sufficiently appear in the materials presented by the parties in their joint appendix. That information consists of what little was known of Army surveillance as of April, 1970. Subsequent to that date and continuing to the present, additional information has been uncovered on the nature of the military program, its origins, purpose, authority, scope, and actual implementation, and its effect on constitutional rights. Consideration of this additional information is necessary to a proper determination of the questions now before the Court. For that reason, copies of the hearings conducted by the Constitutional Rights Subcommittee, United States Senate Committee on the Judiciary, have been submitted as as an appendix to this brief.

SUMMARY OF ARGUMENT

Plaintiffs present a justifiable issue by alleging that their rights to free expression, association and privacy have been infringed by an unauthorized, unnecessary, and indiscriminate military program of investigation into their political views, activities, associations and personal lives. The injuries they suffer to their First Amendment rights consist of a legally perceivable inhibition on the desire or ability to exercise the rights of free expression, an invasion of their right to associational privacy, and an infringement of other areas of protected activity under the First Amendment. Under our Constitution, citizens do not have to pay the price of these consequences in order to voice opinions or

to associate with groups which are unpopular with the government. Not only has military surveillance directly caused these injuries, but it has contributed to or facilitated inhibitions on free expression by joining with and fostering other social and personal forces which supply coercive or deterrent effect to the government's action. Despite such identified harm to First Amendment rights, the government lacks a compelling interest for conducting the military program. The other strict requirements which must be met to save the activity from constitutional infirmity—proper legal authority, careful standards and strict administrative control, and precise implementation—are also absent. In such a context, it is insufficient to argue, as the government does, that plaintiffs are free to exercise their rights despite surveillance and that injury to First Amendment rights must be shown by empirical proof that the surveillance actually prevented plaintiffs or others from exercising their rights.

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interferences. *Bates v. Little Rock* 361 U.S. 516, 523 (1960).

ARGUMENT

PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF JUSTICIABILITY BY ALLEGING AN UNAUTHORIZED, UNNECESSARY, AND INDISCRIMINATE PROGRAM OF MILITARY SURVEILLANCE WHICH HAS INFRINGED UPON THE PEACEFUL EXERCISE OF THEIR FIRST AMENDMENT RIGHTS TO FREE EXPRESSION AND ASSOCIATION

A. Military Surveillance Infringes on First Amendment Rights

Although the issues immediately before the Court involve technical questions of justiciability, these questions arise in a First Amendment case and must be considered in that special context. The challenge by the plaintiffs (respondents here) is to the Army's system of political surveillance of citizens unassociated with the armed forces, who are merely exercising in a peaceful manner their constitutionally guar-

anteed rights to free expression. The plaintiffs seek to vindicate those First Amendment rights.

The Founding Fathers rightly believed that truth alone makes men free, and they desired most of all that the people of America be politically, intellectually and spiritually free. That is the supreme purpose of the First Amendment. It guarantees to every person in our land the freedom to think as he pleases; the freedom to convey information and ideas by speech and other means of communication; the freedom to associate with others to accomplish any lawful purpose; the freedom to meet peacefully for consultation and protest; the right to petition those in power for redress of grievances, either real or imagined; and the freedom to entertain such religious beliefs as comport with his own conscience. As Justice Brandeis, in *Whitney v. Calif.*, 274 U.S. 357, 375-76, (1927), eloquently put it:

> Those who won our independence believed. . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional

tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

These freedoms are impartial and inclusive. They apply to all persons, whether they are wise or foolish, learned or ignorant, profound or shallow, brave or timid, and regardless of whether they love our country or hate it and its institutions. There can be no doubt that these freedoms are often grossly abused and that society is, consequently, often tempted to demand or countenance their curtailment by government.

Essential though the freedoms are, they are not easily exercised in a climate of fear, discord, and dissension, especially when the ideas being expressed are those which are displeasing to government and unsettling to the majority of citizens. The critical views expressed by plaintiffs and others on racial issues, military policy, the war in Vietnam, and the state of our society and the policies of our government are indeed displeasing to those in power and perhaps to most of society. They are voiced in a time of fear and doubt, when other nations threaten the peace of the world and our nation's security, when crime and violence stalk our land, when riotous mobs have burned our cities, and when disquieting demonstrators have staged violent, unlawful demonstrations on streets and campuses. These ideas and the recent discord associated with them have frightened many Americans, including those in high office.

It is at such a time that the First Amendment is most necessary, most in danger, and most difficult to exercise. It is most necessary because it serves at least two purposes: if the complaint being voiced is justified, it will lead to action to ameliorate that complaint; if it is not justified, free speech nonetheless serves as a safety valve for pressures which otherwise might lead to violence. Free expression is most in danger in times of fear because it is then that demands for suppression of unpopular ideas are strongest. And free speech is then most difficult to exercise, because it takes

a brave man to voice unpopular ideas and face the anger of his neighbor and his government. The First Amendment, however, was made for the timid as well as the brave. While government cannot instill courage in the meek, it may not take advantage of a climate of fear to undertake a program which has the effect of restricting the First Amendment only to the very courageous. Government action, such as military surveillance, seemingly innocuous in the abstract, has the very real effect of suppressing the exercise of the First Amendment. The coercive power of this government action lies in the national climate of fear and doubt, and in the very real, tangible apprehension of some unknown form of retribution by government on those whom it fears and therefore watches. That such apprehension exists in America today is manifest.[7]

1. *Deterrence of free expression:*

There can be no doubt surveillance by the military has an inhibiting effect on the exercise of freedom of expression. The spectre of thousands of military agents dutifully observing, noting, and reporting to higher authority information about peaceful citizens expressing views distasteful to government, the gathering of information about the personal lives of these citizens, the collection of similar data held by local, state, and other federal agencies, the placing of this information in computers, and its interchange with other governmental agencies at all levels, have created an atmosphere of official repression. The type of political activity subjected to this surveillance is what is currently termed "dissent." The views which have attracted the Army's attention consist in large part of those which are antagonistic to the Army's policies, its interests, and its own political attitudes. Quite clearly, the Army has put under surveillance its political opponents. The surveillance, however, is even broader than

[7]For examples of the widespread concern over government surveillance and repression, see the collection of letters, news articles, and editorials in *Hearings*, Part II.

this. For included in the surveillance are racial matters, community affairs, labor unions, churches, colleges, the press, political figures, and thousands of common, ordinary citizens opposed to existing governmental policies. Army surveillance has had as its target almost the entire range of political attitudes which differ from "accepted," "mainstream" opinion.

The fact that the government, through the instrumentality of the Army, has seen fit to investigate the views and personal lives of those who disagree with it cannot help but clothe those views and the people who hold them with the taint of official disapproval and suspicion, and encourage the the public to regard them as somehow disloyal. This Court has always been suspicious of attempts by government to label or characterize political views as "approved" or "disapproved."[8] The reason is obvious. Government, by force of example, has considerable power to encourage or discourage the expression of ideas. The vice of military surveillance is that it serves to discourage the expression of controversial views and to impede their acceptance by others.

The impact of widespread governmental investigations of those who hold unpopular views is even greater, because military surveillance, even if it has served no real purpose, is generally thought to have a purpose.

> These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

[8]The Army's attitude towards these views is well illustrated in the February 1, 1968, Annex B (Intelligence) to the DA Civil Disturbance Plan, in which those active in civil rights and antiwar movements are listed as "dissident elements" and only the Army is listed as the "friendly force." *Hearings*, p. 1121.

Surveillance creates an apprehension that some harm, its exact nature unknown, will befall those under surveillance, and those who associate with them.[9]

> We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. . . . The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. *Talley v. California*, 362 U.S. 60, 65 (1960).

The coercive power of the unknown is very great, and may be more of a deterrent than the threat of some specific sanction. This quite tangible fear is not eliminated by statements from those in authority that they intend no ill to those whom they are investigating.

The social ostracism which meets those who express distasteful views to popular opinion makes it an act of personal courage in many cases to oppose the sentiments of the community. Military surveillance in this context can only make the individual's ability and desire to speak out more difficult. Not only must he face the disapproval of his fellows, but he must also incur the price of a loss of his privacy, the recording of his actions in the recesses of the files and computers of the armed forces, and the fear of some future detrimental use of those records by the Army or the other governmental bodies to whom the information is distributed. *Talley v. California*, 362 U.S. 60 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). Since the Army program is ostensibly conducting surveillance of "unlawful" civil disturbance, the citizen whose peaceful, lawful activities are put under surveillance has to bear the added burden, and the added fear, of being arbitrarily designated as one who aids, abets, encourages, supports, or even engages in unlaw-

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[9]See testimony of Ralph Stein, *Hearings*, pp. 244, 257.

ful acts of violence.[10] The harm is well illustrated by the reaction of citizens who support military surveillance: "The military wouldn't be investigating them if they weren't doing something wrong." The military, by conducting surveillance, fosters this public attitude, and thereby inhibits free expression in violation of the First Amendment.

It is no reply to say that empirical proof of this injury has not been demonstrated. The effect of the military program is to increase or encourage silence. How does one measure silence? It would be paradoxical, and obviously impossible, to require the production of witnesses to confess publicly that they have been frightened out of expressing their true feelings because of military surveillance.[11] That would result in the nullification of the proof at the very moment of its assertion. *NAACP v. Alabama* 357 U.S. 449, 459 (1958). It is enough that the government's actions can be "perceived to have the consequence of unduly curtailing the liberty of freedom of [speech] . . ." 357 U.S. at 461.

The First Amendment's protection for freedom of speech, of association, and the right to petition government for redress of grievances is not limited to governmental action which operates directly on those rights and whose avowed purpose is to limit or regulate them.

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Bates v. Little Rock* 361 U.S. 516, 523 (1960).

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[10]The Army made no distinction in its investigations or in its dossier systems between those who engaged in perfectly legitimate activity, those who had been convicted of violating criminal laws or even those who were convicted espionage agents. All were lumped together. It routinely used undefined characterizations such as "militant," "radical," "communist," "right-wing" and the like, to describe these people. See testimony of Ralph Stein, *Hearings*, pp. 244, 248.

[11]*Cf.* Testimony of Pete Parra, *Hearings*, p. 355.

The reason for so extending the protection of the First Amendment to prohibit "subtle governmental interference" is that freedom of expression needs "breathing space to survive" *NAACP v. Button* 371 U.S. 415, 433 (1963). Therefore, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama* 357 U.S. 449, 460-61 (1958). In recent years challenges to government action impinging on the free exercise of the First Amendment have involved a wide range of situations. The Court has limited the requirement of oaths, (*Baggett v. Bullitt* 377 U.S. 360 (1964)); restricted the operation of laws designed to protect the national security, (*U.S. v. Robel* 389 U.S. 258 (1967)); struck down controls on obscenity, (*Smith v. Calif.* 361 U.S. 147 (1959)); limited libel laws, (*New York Times v. Sullivan* 376 U.S. 254 (1964)) and restricted the congressional power of investigation. (*Watkins v. U.S.* 354 U.S. 178 (1957)). These cases have involved otherwise legitimate governmental interests, but because government had trenched upon protected areas in the course of pursuing its interests, its action was impermissible under the First Amendment.

> The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action, . . . to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. . . . In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. . . .
>
> The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. *NAACP v. Ala.* 357 U.S. 449, 461 (1958).

The deterrent effect may be caused by fear of possible loss of employment[12] or of a security clearance, by the threat of a government sanction, by the imposition of a tax, or by some other loss of a government benefit or threat of a legal sanction. But government action may be unconstitutional if it serves as the occasion, although not the direct source of this deterrence.

> Petitioner has made an uncontroverted showing that that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. . . .
>
> It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold. *NAACP v. Ala.* 357 U.S. 449, 462-63 (1958). See also *Bates v. Little Rock* 361 U.S. 516, 523-524 (1960).

The deterrent effect need not, however, stem from forces external to the citizen. It may be self-generated. In *Lamont v. Postmaster General* 381 U.S. 301 (1965), the minor inconvenience of filing a card requesting delivery of foreign propaganda was not a great imposition on an addressee's time. Yet it was ruled unconstitutional because some citizens in sensitive positions "might think they would invite disaster if they read what the Federal Government says contains the seeds of treason." The ordinary citizen, moreover, "is likely to feel some inhibition in sending for literature which

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[12] On occasion Army surveillance has resulted in loss of employment. *Hearings*, pp. 1451-1457.

federal officials have condemned as 'communist political propaganda.'" 381 U.S. at 307. The earlier practice of maintaining lists of such addressees had been discontinued by the time the case reached the Court. Quite clearly, that practice, also involved in military surveillance, would have occasioned even stronger judicial condemnation.

The Communist registration cases underline this conclusion. Here the deterrent effect is caused by the public antipathy towards organizations of this nature and the effect of explicit governmental disapproval of these organizations, both of which factors operate to discourage citizens from engaging in free expression of views which are encompassed or might be encompassed by the registration laws. Government action which inspires or even facilitates self-censorship is deterrence enough, *Smith v. California* 361 U.S. 147 (1959). *Time Inc. v. Hill* 385 U.S. 374 (1967).

The oath cases provide additional examples in which the deterrent effect is not dependent on government applied sanctions alone. Oaths may not have the morally binding force they once had in a more God-fearing age. Yet some who sign disclaimer oaths will endeavor to abide by them, not only because of a speculative fear of future sanctions for violating the oath, but also because of a conscientious desire to avoid conduct and ideas they have sworn to forbear. *Baggett v. Bullitt* 377 U.S. 360 (1964). Furthermore, the oaths also serve as warnings to members of the general public to avoid views and associations on the possibility that some day they may have to ascribe to the oath. The deterrent effect applies not only to those who must take the oath, but to those who may never have to take it.

The lengths the Court has gone to in identifying such deterrence are well-illustrated by the "abstention" cases. They are not directly relevant here because the plaintiffs do not seek an exceptional interference with the normal requirements of federalism but only the exercise of the Court's responsibility to review the constitutionality of federal action. *Marbury v. Madison* 1 Cranch 137 (1803). Yet, the

abstention cases show that even delay caused by litigation amounts to a legally cognizable deterrent.

> [T]o force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect. *Zwickler v. Koota* 389 U.S. 241, 252 (1967).

The line of cases dealing with indirect infringements on First Amendment rights demonstrates that it is the injury to First Amendment interests which is important, and not merely the method by which it is accomplished. To view these cases as prohibiting only certain types of government action which have deleterious effects on the First Amendment is to give them a narrow and artificial construction, and to reflect a strained and grudging appreciation of the vital interest in preserving free expression. It would champion form over substance and put a premium on ingenuity when government seeks to silence those of whom it disapproves. In First Amendment cases especially, government may not restrain speech by indirection any more than by a frontal assault. Any lesser rule would demean the First Amendment and give solace to the ear but deny it to the heart.

2. *Interference with freedom of association:*

The Court has explicitly recognized that effective advocacy may require associational privacy, especially when the ideas advanced are controversial.

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn. v. Douds, supra,* at 402:

> A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. *NAACP v. Alabama* 357 U.S. 449, 462 (1958).

Anonymity is necessary not only when groups meet in private, but also when they demonstrate on the public streets. There is a very real difference between a public event in which the individual participants are essentially anonymous and the official recording of that act in order to identify the individual permanently with that event. The privacy of a citizen who is one of a faceless crowd at a demonstration or speech is totally destroyed when the Army observes and identifies the citizen, seeks out other data held by private and governmental agencies, infiltrates secret meetings,[13] permanently records this data, and makes it generally available to other governmental agencies. The harm done to the citizen—loss of his associational privacy—is even greater than when government merely compels self-disclosure of organizational memberships. Unlike other situations (*Bates v. Little Rock* 361 U.S. 516 (1960), *NAACP v. Button* 371 U.S. 415 (1963), and *NAACP v. Alabama* 357 U.S. 449 (1958)), in which government sought to further other, admittedly legitimate purposes and only incidently infringed upon associational anonymity, military surveillance is an intentional and not an incidental invasion of associational privacy. There can be no question that plaintiffs can point to an injury done to their First Amendment rights, because the action they complain of was designed to dispel the anonymity so necessary for political dissent. *Zwickler*

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[13]The Army also engaged in covert operations. *E.g.*, statement of Assistant Secretary of Defense Froehlke, *Hearings*, p. 422.

v. Kodta 389 U.S. 241 (1967), *Talley v. California* 362 U.S. 60 (1960). That privacy is especially necessary when one is opposing antagonistic governmental forces.

3. *Infringement of Freedom of Religion:*

The Army's indiscriminate intrusion into domestic civilian affairs has also had the effect of interfering with a number of other constitutionally protected activities. Its surveillance of the activities of elected representatives at the federal, state, and local levels, of unions, of the press and of the judiciary and the legal process, for example, are also infringements of the special constitutional rights of citizens engaged in these protected areas. It is of particular concern to your amici that a large portion of this program has also been directed at members of the religious community, and at religious activities. The record is replete with examples of this special invasion into religious aspects of our society. We agree with plaintiffs that the Army's program is an unconstitutional infringement of every citizen's freedom of expression, but we are especially disturbed by the fact that the program was also oblivious to the religious freedoms secured by the First Amendment. The Constitution erects a high wall separating the military from intrusion into domestic life. In ignoring this principle, the Army also breached the wall of separation between the state and the religious activities of Americans. When it included in its program the peaceful and lawful religious activities of Americans, the Army also violated the free exercise clause of the First Amendment[14]

B. There Is No Compelling Governmental Interest in Military Surveillance

Not all action by government which has an effect of deterring the free exercise of First Amendment rights is necessarily unconstitutional, but once such an effect can be

[14]See, *e.g.*, testimony of John A. Sullivan, *Hearings*, p. 351 and Oliver A. Peirce, *Hearings*, p. 305.

identified, the action is constitutionally defective unless the government satisfies strictly imposed limitations. As was succinctly stated by then Assistant Attorney General William Rehnquist, "While there is obviously no justification for surveillance of any kind that does not relate to a legitimate investigative purpose, the vice is not surveillance per se, but surveillance of activities which are none of the Government's business."[15]

The government must have a "compelling" interest in taking the action, it must be properly authorized, the rules must be precisely defined, and the action must be closely supervised and carefully conducted.

> In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose. *Lamont v. Postmaster General* 381 U.S. 301, 310, Brennan, J., concurring.
>
> Broad prophylactic rules in the area of free expression are suspect . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. *NAACP v. Button,* 371 U.S. 415, 438 (1962).

(See *U.S. v. Robel,* 389 U.S. 258, 269 (1967), Brennan, J. concurring, for a discussion of the constitutional defects of inadequate standards in statutes touching on the First Amendment).

The fact that the program of political investigation being challenged has been conducted by the military serves both to underscore the seriousness of its deterrent impact on the First Amendment,[16] and also to identify its defective aspects.

As Chief Justice Warren has said:

> Determining the proper role to be assigned to the military in a democratic society has been a trouble-

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[15] *Hearings,* p. 601.

[16] See also *Tatum v. Laird,* 444 F.2d 947, 958 (1971), Wilkey, J.

some problem for every nation that has aspired to a free political life. The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society.

The critical importance of achieving a proper accommodation is apparent when one considers the corrosive effect upon liberty of exaggerated military power. In the last analysis, it is the military – or at least a militant organization of power – that dominates life in totalitarian countries regardless of their nominal political arrangements. This is true, moreover, not only with respect to Iron Curtain countries, but also with respect to many countries that have all the formal trappings of constitutional democracy. Warren, *The Bill of Rights and the Military* 37 N.Y.U.L. Rev. 181, 182 (1962).

1. *Military surveillance is unauthorized by law.*

Recognizing this danger, the Founding Fathers took pains to subject the nation's military forces to strict controls.[17]

[17]The necessity of limiting the military's involvement in domestic affairs and of keeping it under strict civilian control has been recognized throughout history. For example:

(a) *The Revolutionary Period:* The king "Kept among us, in times of peace, Standing Armies, without the Consent of our legislatures" and "He has affected to render the Military independent of and superior to the Civil power." *Declaration of Independence;*

(b) *The Constitutional Convention:* "It was further observed that, when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army for that purpose, and leaves the militia in a situation as contemptible as possible, lest they might oppose its arbitrary designs; that, in this system, we give the general government every provision it could wish for, and even invite

In six separate clauses of Article I, Section 8, they carefully spelled out that Congress was to have legislative authority

it to subvert the liberties of the States and their citizens; since we give it the right to increase and keep up a standing army as numerous as it would wish, and by placing the militia totally unorganized, undisciplined, and even to disarm them; while the citizens so far from complaining of this neglect, might even esteem it a favor in the general government, as thereby they would be freed from the burden of military duties, and left to their own private occupations or pleasures. Luther Martin, Address to the Maryland legislature, November 29, 1787, in 3 Farrand, *Records of the Federal Convention* 209 (1939 Revised Edition, 1966);

(c) *The Federalist Era:* During the whiskey rebellion "Hamilton had hoped to capture a sufficient number of proper persons for examples, but of the 150 men brought in by the army few could qualify for this distinction. In obedience to Washington's orders; the army remained in strict subordination to the civil authorities. Suspects were not haled before a military tribunal and no man was condemned without due process of law. *Nevertheless,* Hamilton sent out scouting parties to round up suspects, who, in some cases, were brought before him for preliminary examination. While he did not succeed in ferreting out many traitors by these methods, his inquistorial activities later provided his political enemies with a rich vein of propaganda." Miller, *Alexander Hamilton and the Growth of the New Nation,* 409 (1969 ed.);

(d) *The Civil War:* "If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them, can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules."

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the Kind of Great Britain was deemed by our fathers such as offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil Liberty and this martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish." Davis, J., *Ex Parte Milligan,* 71 U.S. (4 Wall) 2, 124-5, (1866);

over the military, yet at the same time they were also careful to guard against legislative tyranny or excessive discretion.

Thus, the Constitution restricts military appropriations to two years, divides jurisdiction over the militia between the central and state governments, and limits the domestic use of the military to repelling invasions, suppressing insur-

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(e) *Reconstruction:* Arguing the necessity of the *possee comitatus* act, Senator Merrimon of North Carolina stated:

"Now sir, we know by sad experience that the Army has been sued not once, but time and time again, in a way that not a court in this country would sanction. The Army has not only been used in the collection of the internal revenue in a way not authorized by law, but it has been used and prostituted to control elections repeatedly. Statehouses have been seized over and over again, and not a great while in the past. The objection of this section is to prevent a like prostitution of the army in the future. I maintain that it is right and proper that we should insist upon it. Let us examine it candidly and see that it is right, and if not make it so; . . . I trust sir, that the President will not improperly employ the Army in the future; but I trusted on former occasions that the President would not do so, but we saw that he did do it, not once, but oftentimes, and where a supposed or pretended emergency may arise he may do so again. Nobody can tell. I cannot and I am not willing to risk any President with such power, even if Congress has the right to confer it."

7 *Congressional Record*, Part 5, 4245 45th Cong., 2d sess. (June 7, 1878) (remarks of Senator Merrimon);

(f) *The Korean War:* "The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." Black, J., *Youngstown Sheet and Tube Co., v. Sawyer*, 343 U.S. 579, 587 (1952).

rection, and executing the laws. Command of the Army was given to the nation's chief civilian officer, the President, and his limited authority for domestic use of the military was repeated in art. IV, §4 – repelling invasion and suppressing domestic violence – together with the exact procedure required to be followed in such cases.

The Constitution, therefore, is extremely explicit in limiting the domestic role of the armed forces. Congress, pursuant to art. I, § 8 and art. IV, § 4, has enacted 10 USC 331-334 which are the sole statutory grants authorizing intervention by the armed forces into American domestic life. Yet, it is clear that these statutues nowhere by their terms specifically authorize[18] or even contemplate surveillance by the military. The statutes govern only the circumstances in which the President may use military force. Unless these conditions are present, the President may not loose the Army on the American people, and any direction by him purporting to do so is without statutory or constitutional support. Even when the necessary preconditions for use of the armed forces under these statutes exist, these statutes also prescribe the procedure that must be employed before the President may call out the Army. Unfortunately, recent American history has provided us with examples where this has been deemed necessary.[19] But the actual use of military force to suppress violence, pursuant to art. IV, § 4 and these statutes, is not challenged here; nor is the power of the Army to perform necessary investigation when actually committed pursuant to these statutes; nor even its right to receive intelligence when such a commitment is about to be made. What is challenged is a program of

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[18]See, *e.g.*, statement of Defense Dept. General Counsel Buzhardt: "As I have said, Senator, there is no act that we know of that deals with the subject one way or the other, in specific terms." *Hearings*, p. 416.

[19]See "U.S. Army Intelligence Role in Civil Disturbances" (undated). *Hearings*, p. 1291.

political surveillance and investigation of persons throughout the entire country, and encompassing almost every form of peaceful political activity, with no relationship to actual situations requiring the use of military force.

The authority to conduct political and personal investigations of such a general nature cannot be read into these statutes. First, the Constitution and American history demonstrates that grants of power to the military to act in domestic affairs must be narrowly construed.

> On the whole, it seems to me plain that the Court has viewed the separation and subordination of the military establishment as a compelling principle. When this principle supports an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in in defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution. While situations may arise in which deference by the Court is compelling, the cases in which this has occurred demonstrate that such a restriction upon the scope of review is pregnant with danger to individual freedom. Warren, *supra* at 197

Second, Congress has expressed itself in the past against a broad view of any military involvement in domestic affairs. The *posse comitatus* act, 18 U.S.C. 1385, prohibits the use of military forces to aid in the enforcement of law by civilian authorities as a "posse comitatus *or otherwise*" unless "*expressly authorized* by the Constitution or Act of Congress."[20] (Emphasis added).

> The statute is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats

[20] 18 USC 592 and 593, prohibiting the use of troops in elections, are other examples of Congress' efforts to protect domestic political life from the inimical influence of military involvement.

> who sponsored it, as expressing "the inherited antipathy of the American to the use of troops for civil purposes." (Sparks, National Development 1877-1885, p. 127, in Vol. 23, The American Nation, A History) Its relevancy to this age is sadly clear (1957, 41 Op. A.G. No. 67). . . . [It is] a statute that is absolute in its command and, explicit in its exceptions. *Wrynn v. U.S.* 200 F. Supp. 457, 465 (1961), Dooling, J.

It is clear that the entire operation of military surveillance is a violation of the federal criminal laws. But even in the absence of these legal and constitutional principles which restrict the military's authority in domestic activities, the Court must apply the principle "that statutory words are to be read narrowly so as to avoid questions concerning the 'associational freedom' that *Shelton v. Tucker* protected and concerning other rights within the purview of the First Amendment." *Schneider v. Smith* 390 U.S. 17, 27 (1968). If, ordinarily, deference will be given to the President and, and the Congress in matters of military affairs outside the borders of our country or in times of war, this broad latitude cannot apply when the military power is involved in domestic affairs, *Youngstown Sheet and Tube Co. v. Sawyer* 343 U.S. 579 (1952), and certainly not when constitutional rights are at stake.

> The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature. That argument finds support in a number of decisions of this Court. However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934). *U.S. v. Robel* 389 U.S. 258, 263-64 (1967).

2. *Military surveillance serves no military purpose.*

If, despite these principles, an implied authority to conduct surveillance can be read into these statutes,[21] such surveillance still does not avoid challenge unless it is necessary to the effective performance of the Army's statutory function.

> . . . [G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. *Bates v. Little Rock* 361 U.S. 516, 525 (1960)

Because of the unusual posture of this case, the formal record is devoid of much evidence which illuminates the contentions of plaintiffs that the program has been overbroad in concept, that it has not been controlled in operation, and that it has provided the military with no assistance of any value to the efficient performance of statutory duties. A consideration of the other information available to the Court demonstrates that the argument of military necessity does not withstand the evidence.

The function of the armed forces in civil disturbance is simply to assist the civilian authorities in suppressing violence. In the absence of a declaration of martial law, the Army performs no civil, governmental functions of its own.

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[21] There is also the question of whether such authority to conduct political surveillance has been properly delegated to the Army. The "Delimitations Agreement" of 1940, as amended, assigns this responsibility to the Justice Department. *Hearings*, p. 1172. The record is devoid of any Executive Order or other written order by the President expressly transferring to the Department of Defense the authority to conduct domestic intelligence operations of the type involved in this litigation.

In civil disturbances, the Army acts as an arm of the civilian authorities, but it is not a law enforcement body. It is only an instrument of power whose limited function is to suppress violence. The information the Army actually needs to prepare for civil disturbance is limited to that logistical information necessary to move troops, quarter them, and deploy them. The Army needs no advance political information, no information on personalities, views, opinions, personal data, and the like.

> The First Amendment's ban against Congress "abridging" freedom of speech, the right peaceably to assemble and to petition, and the "associational freedom" (*Shelton v. Tucker, supra*, at 490) that goes with those rights create a preserve where the views of the individual are made inviolate. This is the philosophy of Jefferson that "the opinions of men are not the object of civil government, nor under its jurisdiction. . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. . . ." *Schneider v. Smith*, 390 U.S. 17, 25 (1968)

The assessment of the need for troops to suppress civil violence is one to be made by the civilian officials, state and federal, whose constitutional and statutory responsibility it is to decide to employ troops. This Court need not assume the functions of a military commander or the President to recognize the limited nature of the information the military needs to perform its limited responsibilities in this area.

3. *Military surveillance is overbroad in direction and indiscriminate in its operation.*

The various senior officials responsible for Army surveillance have repeatedly expressed the view that the military surveillance has not been necessary or helpful.[22] Their judg-

[22] " 'They [the pictures and reports] were the most worthless damn things I have ever seen in my life. It was a waste of paper. We said "Burn 'em," ' Jordan said. 'Even if we didn't have any concerns about civil liberties, which we do, we would have said it was worthless and to

ments confirm the conclusion ordinary common sense dictates. Whatever value this political and personal information might have to civilian authorities, the political views of peaceful critics, much less personal facts about their private lives, can be of no use to the commander deploying his troops to put down violence, nor to the soldier on the street.

The statements of these officials also confirm plaintiff's allegations that the program has permitted an unnecessarily broad scope of discretion to those who implemented the surveillance program,[23] and that it has been implemented in a totally indiscriminate manner.[24] The broad, ill-defined nature of the program is demonstrated graphically by the documents which have so far come to light. The successive Intelligence Collection Plans of 1968 and 1969, the Intelligence Annexes, and similar documents disclose that the Army agents have been told to conduct surveillance on those who practice violence, those who advocate it, those who hold political views similar to those of persons who are sympathetic to violent tactics, and anyone remotely associated or sympathetic to them.[25] No activity protected by the First Amendment has been immune. Peaceful assemblages,

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do away with it,' Jordan said." Interview with Robert E. Jordan, General Counsel, Dept. of the Army, in "Army Explains Civil Snooping," Washington, D.C. *Star*, Dec. 6, 1970, *Hearings*, pp. 1728, 1729. See also letters from Jordan to Ervin, Feb. 25, 1970 and Nov. 27, 1970, *Hearings*, pp. 1048, 1049; 1106, 1107.

[23]Since early 1970, the rules and regulations governing Army surveillance have been repeatedly defined and redefined by the Department of the Army and by the Secretary of Defense.

[24]*E.g.*, *Hearings*, p. 421: "As I indicated in my statement this morning, Mr. Chairman, both the collection plans of February 1, and May 2, could be interpreted in such a way that would permit surveillance of almost anybody who is active in a community where there was civil disturbance. Both plans were very broad." Statement of Assistant Secretary of Defense Froehlke.

[25]See the various Intelligence Collection Plans, *Hearings*, pp. 1119, 1123, 1154.

speeches, marches, the filing of lawsuits, and any other kind of public activity connected with politics have been fit subjects for military surveillance. Once an individual has become the subject of surveillance, almost no information about him is irrelevant. The Collection Plans permitted and indeed required the collection of almost all information possible.[26]

Compounding this excessive requirement on the Army has been a corresponding lack of control actually exercised by senior authority.[27] These officials apparently did not know how many computers were involved, what information was being collected by the Army, and indeed who was actually collecting it. It appears that the first glimmer of knowledge of the actual nature of this surveillance by senior civilians in the Department came quite by accident in late 1968. For at least two years afterwards, revelations continued to surprise these officials, despite repeated efforts on their part to learn and to control the actions of their subordinates.[28]

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[26] "So comprehensive were the requirements levied in the civil disturbance information collection plan that any category of information related even remotely to people or organizations active in a community in which the potential for a riot or disorder was present, would fall within their scope." Statement of Assistant Secretary Froehlke, *Hearings*, p. 384.

[27] As of early 1971, rules governing military surveillance still depended on the "discretion" of government officials. See *Hearings*, pp. 385, 435, statements of Assistant Secretary Froehlke.

[28] See, *e.g.*, statement of Assistant Secretary of Defense Froehlke, *Hearings*, p. 427; statements of Army General Counsel Jordan, *Hearings*, pp. 454, 462, 464; testimony of Edward Sohier, *Hearings*, p. 227. The degree to which various officials were aware of the surveillance and their success in controlling it is only partially disclosed by the unclassified materials presently available. On January 12, 1972, the Constitutional Rights Subcommittee was informed by the Defense Department that most of the intelligence responsibilities of the individual services had been reorganized under the direct control of the Secretary of Defense. Letter, Buzhardt to Ervin, January 10, 1972. See *Hearings*, p. 2086.

The evidence available illustrates that the program as actually conducted has been as broad as the directives permit, and if anything, even broader, and has sometimes been conducted in violation of the Army's own regulations.[29] Documents segregated for possible use in this action, and made available to counsel,[30] confirm that the surveillance was indiscriminate as regards the persons investigated, the activities observed, the details of the information collected and stored, and the arbitrary classification of individuals and their views. An examination of the products of this surveillance discloses no conceivable usefulness that they might have had for any authorized military responsibility. Indeed, these materials defy all attempts to imagine any governmental purpose they might have served, whether "military necessity" or otherwise.

* * * * *

It is well-settled that activities of government having an inhibiting effect on the First Amendment will be carefully scrutinized. Those activities which are unauthorized by law, unnecessarily broad in their design, which commit too large a degree of discretion to those who are charged with implementing them, or which in actual operation are overbroad, are defective constitutionally if they infringe upon First Amendment rights. Plaintiffs have alleged each of these deficiencies and have substantial evidence to prove their allegations at trial. It is evident, therefore, that they have adequately presented the Court with necessary ingredients of a challenge under the First Amendment.

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[29]See, *e.g.*, *Hearings*, p. 422, statement of Assistant Secretary of Defense Froehlke; Letter, Buzhardt to Ervin, March 26, 1971, *Hearings*, pp. 1220, 1222.

[30]These include the computer printouts and other Army intelligence materials transferred to the Department of Justice for possible use in this litigation. See *Hearings*, p. 1220.

CONCLUSION

For the reasons above, and for the reasons submitted by respondents, the Court should affirm the decision below and remand the case for trial on the merits.

Respectfully submitted,

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February, 1972

APPENDIX

The Hearings on Federal Data Banks, Computers, and the Bill of Rights, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 92d Congress, 1st Session (1972), Parts I and II, are submitted separately as an appendix to this brief.

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IN THE

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OCTOBER TERM 1971

No. 71-288

MELVIN B. LAIRD,
SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

ARLO TATUM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF A GROUP OF FORMER ARMY INTELLIGENCE AGENTS, *AMICI CURIAE*

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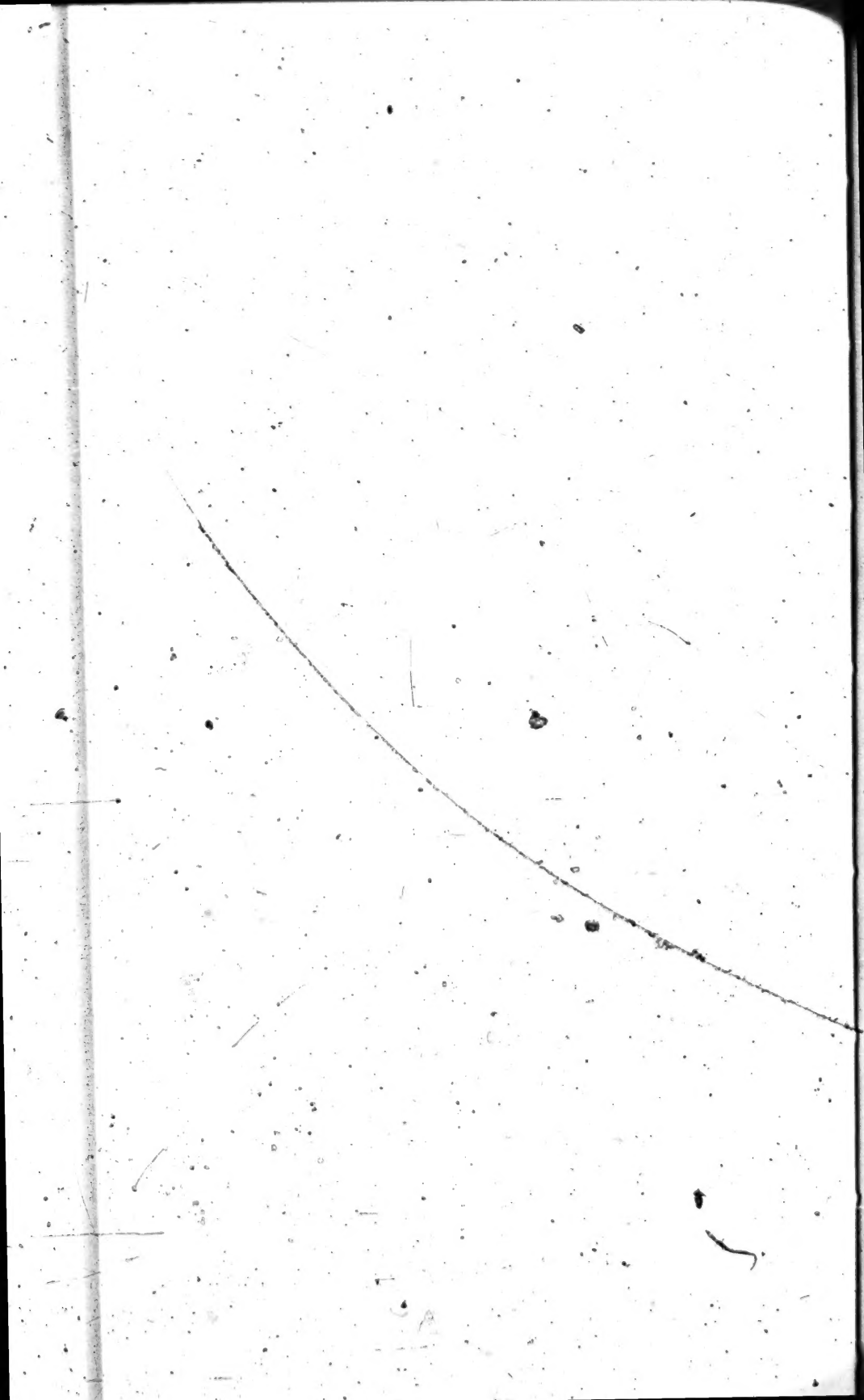

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BRIEF OF A GROUP OF FORMER ARMY INTELLIGENCE AGENTS, *AMICI CURIAE*

INTEREST OF THE *AMICI**

The *amici curiae* are a group of former officers and enlisted men who served in military intelligence from 1963 to 1971. Since January 1970 members of the group have endeavored to persuade the Government to undertake a complete reform

*This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

of the military's practice of monitoring civilian political activity.

While on active duty, all but a few of the *amici* were personally involved in the Army's surveillance and data-keeping. Some were action officers in the Army Operations Center during the riots and demonstrations of 1967, 1968, and 1969. Others attended demonstrations, rallies, marches, and church meetings, and wrote reports on the political activities of persons and groups unassociated with the armed forces or civil disorders. Some served as domestic intelligence analysts, maintained data banks, and read and wrote reports on "dissident," "militant," "extreme right-wing," and "leftist" activity. Still others personally infiltrated law-abiding civilian groups. Those not directly involved in the Army's domestic intelligence operations were legal instructors at the Army Intelligence School. Brief descriptions of each of the *amici* are set forth on pages 27-30, *infra*. All were honorably discharged; most hold commendations or medals for their service.

The *amici curiae* have undertaken to bring about basic reforms in the practices of Army intelligence because they are convinced that much of what they and their fellow agents were ordered to do served no useful purpose, exceeded the Army's mission, and caused many people to alter or abandon lawful modes and objects of political expression. Accordingly, they have endeavored to bring their knowledge, expertise, and judgments to the attention of the appropriate authorities in the Department of Defense, Congress, and the courts. Some have written articles, testified in court, appeared before Senate and executive branch inquiries, furnished information to the news media, and drafted legislation. Their disclosures form the basis of this lawsuit (App. 10, 13-43) and the hearings of the Senate Subcommittee on Constitutional Rights and have thus led to some of the recent reforms, such as the June 9, 1970 directive attached to the Petitioners' brief (45-51).

The *amici* have personal interests in the outcome of this litigation. Like the plaintiffs, they fear misuse of political and personal data in Army files, some of which pertain to their own lawful political activities. They have seen several of their number who agree with this brief decide that it would not be prudent for them to add their names to it. Despite these fears, they have endeavored to remain friendly critics of their former organization and to present an even-handed analysis of its needs, authority, and operations.[1] Most would not hesitate to volunteer in time of national emergency for further service in military intelligence. At the same time they believe that a judicial determination of the proper limits of the Army's domestic intelligence mission is urgently needed to protect them and their former colleagues from again having to choose between obeying orders and keeping their oath to uphold the Constitution.

QUESTIONS PRESENTED

Because their ability to contribute to the resolution of this controversy derives primarily from their knowledge and understanding of the Army's domestic intelligence needs, authority, and operations, the *amici curiae* limit their arguments to two questions:

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[1] In attempting to promote constructive reform, the *amici curiae* have made no statements as to the Army's motives, but have confined their attention to the present and possible effects of military surveillance on civilians. They represent no one but themselves. In describing the surveillance and data-keeping, they have taken care that none of their disclosures could injure the national security, be of use to foreign intelligence agencies, reveal sensitive methods of operation, or jeopardize the identity of undercover agents.

For further information about the *amici curiae* and the role they have played in this controversy, see *Federal Data Banks, Computers and the Bill of Rights.* Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U. S. Senate, 92nd Cong., 1st Sess. (1971).

I. Whether the plaintiffs have standing to sue,

A. Whether the complaint alleges a present infringement of First Amendment rights;

B. Whether the activities alleged are likely to have a chilling effect;

C. Whether the plaintiffs' stake is sufficient to assure adverseness; and

D. Whether plaintiffs' standing is reinforced by the overbreadth of the surveillance.

II. Whether this controversy is ripe for adjudication,

A. Whether this case was ripe for adjudication when filed; and

B. Whether this controversy is still ripe.

STATEMENT OF THE CASE

The *amici curiae* adopt the plaintiffs' statement of the case but wish to stress the following:

(1) This controversy concerns only the sufficiency of the plaintiffs' pleadings. As this Court has said, "in appraising the sufficiency of the complaint we follow . . . the accepted rule that a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

(2) Representations in the petitioners' brief as to the Army's domestic intelligence needs and authority are the subject of intense controversy and have yet to be established by any trial court. (*E.g.*, see pages 20-31, *infra*).

(3) At least in part because the District Court ruled that it could decide this lawsuit on the basis of affidavits alone, the operations of Army intelligence have been mischaracterized as "essentially no different from 'what a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications avail-

able on any newsstand.'" (Petitioners' brief, 15, citing App. 138). As Part I of the following argument will show, there is ample information in the record below and in the hearings of the Subcommittee on Constitutional Rights[2] to show that the allegations of the complaint are susceptible of proof, and that the trial court could find a resulting chilling effect on the exercise by the plaintiffs and others of their First Amendment rights.

(4) The Justice Department's statement of the case contains serious errors and omissions of fact concerning the timing and extent of recent Department of the Army directives and conveys the misleading impression that the overbroad and chilling activities of which the plaintiffs complain ended prior to the filing of this lawsuit or immediately thereafter. The views of the *amici curiae* regarding the continuance of Army surveillance of civilian political activity are set forth in Part II of the following argument.

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[2] *Federal Data Banks, Computers and the Bill of Rights.* Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U. S. Senate, 92nd Cong., 1st Sess. (1971), Parts I-IV. Hereinafter cited as *Hearings.*

The Court may, of course, take notice of the Hearings and other public facts for the purpose of determining whether the claim of a chilling effect is sufficiently made out by the pleadings to require a full hearing by the trial court. The chilling effect of the military's surveillance on the exercise of First Amendment rights is at least in part a question of law to be determined by the court on the basis of judicially noticeable information as well as evidentiary material. See *Lamont v. Postmaster General*, 381 U. S. 301 (1965) and *Talley v. California*, 362 U. S. 60 (1960). The *amici* submit that the judicially noticable facts in this case are sufficient to establish the existence of an unconstitutional chilling effect as a matter of law, although the Court need not make such a finding in order to affirm the ruling below.

SUMMARY OF THE ARGUMENT

The plaintiffs have standing to bring this case because their complaint clearly demonstrates a logical nexus between the chilling effect which military surveillance of civilian political activity has upon the exercise of First Amendment rights and their status as targets of that surveillance. The complaint is specific about the nature of the infringement, the source of of the chill, and the status of the plaintiffs as parties in a position to be chilled.

The Justice Department's formulation of the chilling effect test, however, would require the plaintiffs and others similarly situated to show that the Army's surveillance had placed them in circumstances which would lead most men to abandon their First Amendment rights. Such a test would put the prospective plaintiff in an impossible dilemma: he cannot invoke his rights unless he is immobilized by fear, but if he really were immobilized by fear, he would not invoke his rights.

The proper test is not whether any particular person is chilled in fact, but whether under the circumstances the activities complained of would be likely to inhibit persons of ordinary courage, commitment, and vulnerability from exercising their First Amendment rights. If so, then the Court must examine the circumstances surrounding the plaintiffs to make certain that their stake in the outcome is sufficient to assure the adverseness upon which courts depend for the full development of issues. Without purporting to speak for the plaintiffs, the *amici curiae* submit that the plaintiffs have good reason to be chilled and to be motivated to litigate their challenge fully.

If the Court has any doubts about the plaintiffs' standing, these doubts should be resolved in their favor because of the unquestionable overbreadth of the activities challenged in this suit. As the complaint alleges and as witnesses before the Ervin hearings have confirmed, none of the activities complained of were ever authorized by the Constitution or

federal statute. The Justice Department's failure to produce any documentary proof that the surveillance was part of any authorized mission of the armed forces or served any of their legitimate informational needs further supports the plaintiffs' allegations of overbreadth and underlines the importance of allowing them standing to sue.

This litigation is ripe for adjudication. Contrary to the to the Justice Department's representations, it was ripe at the time this lawsuit was filed and has not been rendered moot by the various directives cited in the Department's brief—all of which were issued after the filing of this suit. Whether the recent directives are appropriate to the task and whether they have in fact been obeyed are questions which only a trial court can resolve and, as the papers in this case and the Ervin hearings show, the sufficienoy of these purported reforms is the subject of intense controversy.

Moreover, even if the Justice Department could prove that administrative measures have finally stopped the activities complained of, this controversy still would not be moot, because the Army reserves the right to resume the surveillance and data-keeping whenever it sees fit.

I.

PLAINTIFFS HAVE STANDING TO SUE

"The 'gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Baker v. Carr*, 396 U.S. 186, 204 (1962).

Whether the plaintiffs have the requisite personal stake in the outcome depends upon the circumstances of the particular case. *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Those circumstances must show that there is "a logical nexus between the status asserted by the plaintiffs and the precise

nature of the constitutional infringement alleged." *Id.*, at 102. The *amici curiae* submit that the plaintiffs have demonstrated the existence of a logical nexus between the infringements alleged in their complaint and their status as targets of the surveillance and as members of the class they seek to represent.

A. The Complaint Alleges a Present Infringement of First Amendment Rights

Paragraph 15 of the plaintiffs' complaint (App. 10) specifically alleges:

> The purpose and effect of the collection, maintenance and distribution of the information on civilian activity described herein is to harass and intimidate plaintiffs and others similarly situated, and to deter them from exercising their rights of political expression, protest, and dissent from government policies which are protected by the First Amendment by invading their privacy, damaging their reputations, adversely affecting their opportunities for employment, and in other ways.

In paragraph 17 of their complaint (App. 11), the plaintiffs charge:

> The conduct of the defendants described herein deprives plaintiffs and persons similarly situated of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy guaranteed and protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States, and deprives all Americans of basic First Amendment rights by inhibiting and curtailing free and open discussion of issues of public importance.

The specific actions of the Army which constitute the source of the chilling effect are set forth in the complaint in considerable detail. Plaintiffs allege that the defendants "are engaged in the surveillance of lawful and peaceful civilian political activity within the United States" (App. 8), that data on these activities has been collected by a variety of

means, including the use of anonymous informants and electronic equipment (App. 10), stored in computerized and non-computerized records systems (App. 9-10), distributed indiscriminately over military teletypes (App. 9), and published in a blacklist" (App. 9).

Exhibit A to their complaint is a "Weekly Intelligence Summary" which dramatically demonstrates the scope and depth of the Army's interest in lawful and peaceful political activity unrelated to its civil disturbance and military security missions (App. 13-21). Exhibit B (App. 22-43) is an article by Christopher H. Pyle, a former captain in Army intelligence and one of the *amici curiae*, which states (App. 23):

> . . . Today, the Army maintains files on the membership, ideology, programs, and practices of virtually every activist political group in the country. These include not only such violence-prone organizations as the Minutemen and the Revolutionary Action Movement (RAM), but such non-violent groups as the Southern Christian Leadership Conference, Clergy and Laymen United Against the War in Vietnam, the American Civil Liberties Union, Women Strike for Peace, and the National Association for the Advancement of Colored People.

Captain Pyle also disclosed the use of undercover agents to infiltrate civilian groups and the unauthorized invasion of confidential student files (App. 23-24).

At the hearing in the District Court, the plaintiffs offered to substantiate their allegations with witnesses, one of whom had infiltrated a coalition of church groups in Colorado (App. 122-123, 125-26).[3] Judge Hart, however, refused to

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[3] "MR. ASKIN [counsel for plaintiffs]: Your honor, he will testify that he was instructed to infiltrate a group known as the Young Adults. Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization . . . ." Transcript of the Proceedings, *Tatum v. Laird*, Civil Action No. 459-70, D.C.D.C., April 22, 1970, at 29. Quoted in Respondents' Brief in Opposition, 10.

hear any witnesses on the ground that affidavits were a sufficient basis on which to decide the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss (App. 123-24).

B. The Activities Alleged Are Likely to Have a Chilling Effect

The chilling effect doctrine provides that "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965) (concurring opinion by Mr. Justice Brennan).

The Justice Department insists, however, that the activities alleged are somehow not chilling enough. Without ever clearly stating what the test is, the Department claims that the plaintiffs' allegations are insufficient because they do not show that the Army (1) made a "specific threat or imposition of legal or criminal penalties," (2) undertook to prosecute them, dismiss them from employment, or otherwise subject them to the force of a law before they could challenge it in court, (3) took unlawful inhibitory action, (4) misused, or specifically threatened to misuse, information about the plaintiffs to their detriment, or (5) compelled them to disclose their political beliefs or ideas (Petitioners' brief, 24, 25, 27, 41 n. 32, 24 respectively).

The *amici curiae* submit that even under this limited selection of relevant considerations, the plaintiffs' complaint states a claim for relief. Plaintiffs specifically charge unlawful action (App. 9-11), and specifically allege misuse of data through the indiscriminate circulation of reports which are made available to military, federal, and state agencies (App. 9-10).

The crux of the Department's argument, however, is that fear of a surveillance which serves no legitimate state interest is not sufficient to state a claim for relief—that the plaintiffs must prove in addition that the Army has taken, or has directly threatened to take, other adverse action against

them, or that the data has injured them in ways apart from the self-censorship it induces. To limit proof of the chilling effect to evidence of direct intimidation, of course, would be a total perversion of that doctrine and of common sense. As Mr. Justice Brandeis warned in *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion):

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding.

Similarly, it would make no sense to restrict the protection of the chilling effect doctrine to those persons who can prove that the inhibiting activity had already cost them their jobs, defamed their reputations, threatened them with prosecution, or directly confronted them with intimidating circumstances, such as demands that they divulge their beliefs or associations.

By either test, direct intimidation or harm in addition to intimidation, the Government would place all dissenters in the classic "Catch 22" dilemma: they can invoke their rights if they are immobilized by fear, but if they really were immobilized by fear, they would not invoke their rights.[4] To place such an onerous burden of proof on persons seeking to challenge an unauthorized, unnecessary, and chilling surveillance

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[4]The reference is to Joseph Heller's novel *Catch 22* (New York: Dell, 1961) in which the hero, a bombardier in the U. S. Army Air Force in World War II, asks to be relieved from flying any more missions on the ground that he is suffering from paranoid delusions. He explains that he thinks that everyone is trying to kill him. Everyone includes the Army which sends him up in airplanes and the Germans who try to shoot him down. His request is rejected. "There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind . . . . All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions."

operation would be to immunize from judicial scrutiny all surveillance activities regardless of their potential for misuse or their effect on the willingness of persons to exercise their First Amendment rights and to engage in lawful political activity. Such a rule would simultaneously intensify the chilling effect and open the door to intelligence agents who might intentionally abuse their authority.[5]

The *amici curiae* object to this formulation of the chilling effect doctrine. The proper question for the court to ask when determining whether certain activities are likely to inhibit political activity is not whether any particular person has in fact been deterred, but whether it is reasonable to conclude from all the circumstances that people may be deterred.

In making this determination, judges must be careful not to substitute their circumstances for those of the class likely to be chilled. What may not seem intimidating to a judge may well be chilling to a private citizen with limited resources who seeks lawfully to advance a controversial idea. This is not to say that the court should analyze the risks of surveillance from the distorted perspective of a dissenter with paranoid delusions. At the same time it should not proceed on the assumption that all dissenters are as courageous as Patrick Henry or Samuel Adams. The chilling effect doctrine exists to protect men and women of ordinary courage and commitment, with the ordinary vulnerabilities of family, debts, limited mobility, and a status to maintain.

Thus, in determining the sufficiency of the plaintiffs' complaint, the fundamental question before the court is whether the activities alleged could inhibit persons of ordinary courage, commitment, and vulnerability. If so, then a valid claim of infringement of First Amendment rights has been alleged and the court can turn to the separate question of whether

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[5] As Army General Counsel Robert E. Jordan, III, warned: "I do think it is dangerous to create too much capability in this field. The guy who (runs such an apparatus) for the first couple of years may be okay, but you never can tell who's coming after him." Washington *Sunday Star*, Dec. 6, 1970. Reproduced in *Hearings*, Part I, p. 1728.

the plaintiffs' stake in the outcome is sufficient to assure adverseness and the proper development of issues common to the class they seek to represent.

C. Plaintiffs' Stake in the Outcome is Sufficient to Assure Adverseness

To establish a logical nexus between their status and the infringement alleged, the plaintiffs must establish that they are targets of the surveillance and that the risks attendant to that status give them a sufficient stake in the outcome of the litigation to assure the adverseness upon which courts depend for the full development of issues.[6]

1. *Plaintiffs allege that they are targets of the surveillance.* The complaint specifically alleges that the plaintiffs have been the subjects of Army intelligence reports (App. 9). One of those reports is attached as Exhibit A to the complaint (App. 13-31). The report purports to describe, and in some instances to characterize unfavorably, the political activities of certain plaintiffs as well as many other individuals and organizations. Thus, for example, the Rev. Albert Cleage is said to have spoken "to an estimated 100 persons at the

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[6] As this Court explained in *Flast v. Cohen, supra,* at 100, the purpose behind the adverseness requirement is to protect the courts from having to decide political questions, answer hypothetical or abstract inquiries, or make rulings on the basis of arguments that are friendly, feigned, or collusive. Here the plaintiffs are not public officials seeking advisory opinions; they are private citizens and organizations seeking declaratory and injunctive relief against government actions which they believe unconstitutionally raise the cost of political dissent. Their complaint does not raise hypothetical questions about imagined contingencies; it alleges present loss of First Amendment rights through a self-censorship forced by an intimidating system of surveillance and record-keeping. The self-censorship is alleged to derive from fear for their privacy, for their reputations, and for their employment and opportunities for employment (App. 10). Finally, any lawsuit which pits the War Resisters League against the Defense Department and ACLU attorneys against the Internal Security Division of the Justice Department can hardly be regarded as friendly, collusive, or feigned.

Emmanuel Methodist Church . . . on the topic of black unity and the problems of the ghetto." (App. 17). Conrad Lynn, a black lawyer who "replaced Yale Chaplain William Sloane Coffin as the principal speaker" at a meeting at the First Unitarian Church of Philadelphia (App. 17), was characterized as "an author of draft evasion literature." (App. 17). Although the Justice Department claims (Petitioners' brief, 32) that the Army's activities were "'directed primarily at ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act' (App. 70)," in no instance was any of the plaintiffs reported to have violated a law, advocated violence, or threatened military security.

Captain Pyle's article, reproduced as Exhibit B to the plaintiffs' complaint (App. 22-43), not only described the Army's system for monitoring and keeping files on "virtually every activist political group in the country" (App. 23); it also linked that surveillance to one of the plaintiffs. "Thus an IBM card prepared . . . for the . . . computer file of Arlo Tatum, executive secretary of the Central Committee for Conscientious Objectors, contains a single notation—that Mr. Tatum delivered a speech at the University of Oklahoma on the legal rights of conscientious objectors." (App. 26).

2. *Targeting puts the plaintiffs in jeopardy.* As the plaintiffs allege in their complaint (App. 10-11) their stake in the outcome of this litigation is nothing less than:

> a. their Constitutional right to speak, assemble, and petition their government free from fear of the purposes or effects of the Army's surveillance, reports, and data banks.
>
> b. their right of individual and organizational privacy, which includes freedom from the unwarwanted intrusions of anonymous informants and undercover agents and the effects of unauthorized government reports and actions which invade their political, personal, and organizational life.

However, because the plaintiffs were not allowed to present any testimony in the District Court, the record of this case is not as explicit as it might be as to how these stakes are placed in jeopardy.

The *amici curiae* cannot speak for the plaintiffs, but their personal experience does qualify them to advise this Court as to why parties in the plaintiffs' position ought to feel a strong stake in the outcome of this litigation and want to pursue it vigorously. To support their analysis, the *amici curiae* draw wholly from information on the public record which would be likely to influence the plaintiffs and persons and groups similarly situated. They ask the Court to take judicial notice of this information not because it may be true (a judgment which must be made by the District Court), but because it is the kind of information which responsible people rely on daily to anticipate the likely consequences of their political conduct.

There are at least four good reasons why parties like the plaintiffs should seek the declaratory and injunctive relief requested. First, it is clear that the reports cited in the record below are not the only reports which the Army had on the plaintiffs and others like them. A "Weekly Intelligence Summary" (App. 13-21) is by definition a digest of more extensive reports supplied by Army agents, the Federal Bureau of Investigation, state and municipal police departments and other sources. The magnitude of the collection effort is suggested both by Mr. Pyle's article (App. 22-43) and by the testimony of former agents before the Ervin subcommittee. Examples of some of these other intelligence reports have appeared in the press[7] and are reproduced in the record of the Ervin hearings.[8] The comprehensive nature of the surveillance also is graphically demonstrated by the various "domestic intelligence collection plans" under which

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[7] *E.g., New York Post,* Jan. 4, 1971, p. 3; *New York Times,* Jan. 18, 1971, p. 22; *New York Times,* Jan. 29, 1971, p. 10.

[8] *Hearings,* Part I, pp. 239-242.

they were carried out. These plans also have been made public.[9] Thus individuals and groups like the plaintiffs have good cause to fear that the Army's reports contain far more damaging information about them than might first appear from examining the particular report reproduced as Appendix B to the complaint in this case. Obviously, the plaintiffs cannot be expected to detail such information in their complaint. In this case as in others, that is the function of discovery.

Second, the intelligence summary appended to the complaint begins with a standard "distribution list" (App. 13-14) which indicates that such reports were, as the plaintiffs allege, "regularly, widely, and indiscriminately circulated. . . ." (App. 9).[10] The swapping of such reports with the FBI, state and municipal police departments, and even the Central Intelligence Agency is now a matter of public record.[11] Thus the possibility that Army reports will be used (intentionally or not) in ways that injure the reputations of law-abiding dissenters has been multiplied many times over; literally tens of thousands of federal, state, and military personnel have seen these reports and have had access to the files in which they are stored.

Third, it is widely known that Army intelligence did not collect all of its information by clipping newspapers. Exhibit

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[9] *Hearings*, Part I, pp. 1119-1138, 1154-56, Part II, pp. 1734-37. See also *Cong. Rec.*, May 26, 1971, S7845-46.

[10] Routine recipients of weekly domestic intelligence summaries included the Army Operations Center, the Continental Army Command, the U. S. Strike Command, the Army Materiel Command, the Air Defense Command, each of the Continental armies, the XVIII Corps, Military District of Washington, 1st Armored Division, 2nd Armored Division, the Strategic Communications Command, Fort Devens, Mass., the Defense Intelligence Agency, and at least 34 headquarters and region offices of the Army Intelligence Command. Overseas commands receiving copies of this report included commands in Europe, Alaska, Hawaii, and Panama (App. 13-14).

[11] *Hearings*, Part I, pp. 129, 162, 171-82, 187, 224, 267-71, and 292.

B to the plaintiffs' complaint (App. 23) and their offer of testimony before Judge Hart (App. 125) both refer to covert operations. Since then, many more such operations have come to light. For example, according to former agents who testified before the Ervin hearings, Army intelligence

(1) assigned a team of agents to stake-out the grave of the late Rev. Martin Luther King (*Hearings*, 196).

(2) followed the Poor People's Campaign and their mules all the way to Washington, D.C. (*id.*, 197).

(3) infiltrated undercover agents into Resurrection City (*id.*, 197-98).

(4) maintained a command post inside and had agents on the floor of the 1968 Republican National Convention in Miami (*id.*, 198-99).

(5) had an agent from the Office of the Assistant Chief of Staff for Intelligence on the floor of the 1968 Democratic National Convention in Chicago (*id.*, 200).

(6) posed as press photographers and newspaper reporters, sometimes with bogus press credentials (*id.*, 185).

(7) infiltrated the headquarters of the National Mobilization Committee to End the War in Vietnam (*id.*, 201).

(8) posed as students to monitor classes in the Black studies program at New York University during the summer or fall of 1968 (*id.*, 296).

(9) posed as television newsmen and taped interviews with demonstrators in Chicago during the 1968 Democratic National Convention (*id.*, 200-01).

(10) kept card files, dossiers, and photographs on students and faculty at the University of Minnesota (*id.*, 155).

(11) infiltrated the Colorado Springs Young Adults Project (a coalition of church youth groups), mon-

itored an anti-war vigil inside the Chapel of Colorado College, and sent plainclothes agents to attend meetings of the Colorado Springs anti-poverty board (*id.*, 306, 310-12).

(12) conducted vehicular and foot surveillance of the Revs. Jesse Jackson and Ralph Abernathy during the Democratic National Convention of 1968 (*id.*, 200).

(13) shadowed Gov. Lester Maddox and his Georgia delegation to the same Convention (*id.*, 199-200).

Given the scope of these covert operations and the variety of individuals and groups watched, the *amici curiae* submit that parties like the plaintiffs have good reason to fear invasions of their privacy.

Finally, there have been a number of well publicized accounts of instances in which military intelligence reports have been misused. For example, reports are said to have been

(1) taken from the Intelligence Command's highly inaccurate civil disturbance teletype and filed in Army dossiers on persons who have held, or were being considered for, security clearances, thus contaminating what are supposed to be investigative reports with unverified gossip and rumor. This practice directly jeopardized the employment and employment opportunities of persons seeking sensitive positions with the federal government or defense industry (*id.*, 229-30).

(2) leaked to the press to impugn the mental stability of a state law enforcement official (App. 38).

(3) cited to cast doubt on the loyalty of a candidate for Congress.[12]

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[12] *New York Times*, Oct. 27, 1954, p. 17; Oct. 28, 1954, p. 29 (Navy reports).

(4) turned over to a private anti-Communist crusader in the business of identifying "subversives" to Congressional committees and others.[13]

(5) compiled to help a private employer find grounds to fire an unwanted employee.[14]

The foregoing facts provide but a tiny glimpse of the dangers inherent in the Army's political data banks. As a matter of law, however, they are more than sufficient to warrant rejection of the Justice Department's claim that no state of facts could be proved which would support the plaintiffs' allegation of a present inhibiting effect on their willingness to exercise First Amendment rights.[15]

D. Plaintiffs' Standing Is Reinforced by the Overbreadth of the Surveillance

The plaintiffs specifically allege (App. 11) that the Army's domestic intelligence program "exceeds the lawful needs and authority of the United States Army and is without any lawful statutory authority." In other portions of the complaint,

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[13]Richard Halloran, "Senate Panel Holds Vast 'Subversives' File Amassed by Ex-Chief of Army Intelligence," *New York Times*, Sept. 7, 1971, p. 35. Reproduced in *Hearings*, Part II, pp. 1722-26.

[14]Morton Kondracke, "Investigate charges of business use of Army spies," *Chicago Sun-Times*, May 16, 1971, p. 14. Jared Stout, "Army Punishes Three Officers for Misusing Intelligence," *Philadelphia Inquirer*, July 21, 1971. Reproduced in *Hearings*, Part II, p. 1767.

[15]The Department of Justice rests much of its argument that the plaintiffs lack standing on a remark made by one of their co-counsel that plaintiffs "are not people, obviously, who are cowed and chilled." (Petitioners' brief, 16, 36.) The statement is taken out of context. Read in the context of the pleadings, offers of proof, and oral argument, it is nothing more than an imprecise acknowledgement that the plaintiffs are not so totally cowed and chilled that they will abandon all of their rights, including recourse to the courts. Needless to say, the sufficiency of a complaint cannot be made to turn solely on the basis of one imprecise statement made in the heat of oral argument. All of the allegations and all of the facts likely to be proved must be considered together in a light most favorable to the plaintiffs.

in the annexed exhibits, and in offers of proof to the District Court, they detail the ways in which the surveillance exceeded the Army's legitimate needs and authority, *e.g.*, through the use of anonymous informants (App. 9, 23-24), undercover agents (App. 23), covert infiltration of civilian organizations (App. 125), compilation of blacklists (App. 9), storage of information on civilians in Army data banks (App. 9-10, 25-26), and the "indiscriminate" dissemination of reports about the plaintiffs (App. 9).

These allegations indicate that the Army's surveillance of civilian political activity is overbroad in both a constitutional and statutory sense. Accordingly, any doubts as to the plaintiffs' standing to maintain this action should be resolved in their favor. As Mr. Justice Frankfurther noted in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 156 (concurring opinion): "standing to challenge official action is more apt to exist when that action is not within the scope of official authority than when the objection to the administrative decision goes only to its correctness."

1. Surveillance and data-keeping are unauthorized.[16] None of the seven provisions of the United States Code which define the Army's domestic role authorizes the collection of political and private data on civilians.[17] Indeed, the plain

[16] Were they authorized by statute, of course, they would still be unconstitutional.

[17] They are 10 U.S.C. Sections 331, 332, and 333 (defining the conditions under which the President may direct troops to assist overburdened civilian authorities to restore order, execute laws, and enforce court orders), 10 U.S.C. Section 334 (requiring the issuance of a Presidential proclamation before troops may be deployed under Sections 331-333), 18 U.S.C. Sections 592 and 593 (making it a crime to use troops at polling places or to influence elections), and 18 U.S.C. Section 1385 (providing criminal penalties for subordinate commanders who direct military personnel to execute the civil laws or serve in a posse comitatus without a direct order from the President acting pursuant to a Constitutional or statutory authorization). None of these provisions authorizes the massive surveillance complained of in this case. Nor is there any evidence in the legislative history of these

meaning of the posse comitatus act of 1878 (18 U.S.C. Sec. 1385) would appear to forbid the use of soldiers as municipal detectives or para-policemen. It provides criminal penalties for "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully *uses any part of the Army* or the Air Force as a posse comitatus or otherwise *to execute the laws* . . . ." [Emphasis added]. Moreover, the requirement of 10 U.S.C. Sec. 334 that the President first issue a proclamation before deploying riot troops would appear to rule out the deployment of plainclothes soldiers in advance of regular units.[18]

2. *Surveillance of civilians is not part of the civil disturbance mission.* The Department of Justice seeks to justify the surveillance of individuals (even as it claims to have curbed it) by equating the Army's civil disturbance mission with that of the local police (Petitioners' brief, 32-33). However, troops are not policemen and Army intelligence agents are not city detectives. The Army's job is to deal with rioting masses, not isolated individuals. When a person commits a crime, such as arson or looting, in the presence of riot troops they may detain him for arrest and prosecution by civilian authorities in civilian courts. Their authority for such action is akin to the power of citizen's arrest, by which any person has the authority to detain a person whom he observes commiting a felony or a breach of the peace.[19] But soldiers on riot duty do not

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statutes and their use in times of civil disorder that any President or Attorney General has ever tried to stretch their meaning to warrant such activity.

[18] The surveillance and data-keeping also appear to violate the Delimitations Agreement of 1949 (Army Regulation 380-115). By that agreement Army intelligence explicity conceded that the FBI had exclusive jurisdiction to investigate civilians unaffiliated with the armed forces or defense industry who were suspected of posing a risk to internal security.

[19] According to the Kerner Commission, for example, only seven states have laws granting National Guard troops the arrest powers of police officials. *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam Books ed., 1968), p. 526.

have the authority to investigate crime, track down conspirators, apply for arrest and search warrants, or otherwise execute the criminal law. They are an order-keeping force. They may direct traffic, guard buildings, enforce curfews, and disperse rioters, but they may not function as policemen or detectives until a state or martial law is declared by the President.[20]

Were the surveillance and data-keeping truly considered by the responsible civilian officials to be part of the Army's legitimate civil disturbance mission, the Department of Justice undoubtedly would be able to produce directives signed by the President or the Secretaries of Defense and Army authorizing it. However, the one directive which the Department does cite (DoD Directive No. 3025.12, dated June 8, 1968) is a general mission-type assignment which says nothing about political surveillance or biographic or organizational data banks on dissenters (Petitioners' brief, 31).[21] To date,

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[20] The classic authority for this limited definition of the Army's role in civil disorders continues to be the Department of the Army Field Manual, FM 19-15: *Civil Disturbances and Disasters* (Washington, D. C.: U. S. Government Printing Office, 1952, 1968). It places heavy emphasis on the crowd control functions of federal troops and the primacy of civilian police officers in the apprehension of criminals. This is the role advocated by Cyrus Vance in his "after-action" report on Detroit and by virtually all military commanders who testified at *Hearings before Special Subcommittee to Inquire Into the Capability of the National Guard to Cope with Civil Disturbances.* Committee on Armed Services, U. S. House of Representatives, 90th Cong., 1st Sess., August 10, 11, 15, 22, 23, 24, 25, and October 3, 1967. None of the after-action reports presented to that subcommittee calls for organizational and personality files or blacklists on persons who someday might become involved in a civil disturbance.

[21] It says only that the Secretary of the Army shall be Executive Agent for the Department of Defense in ". . . Providing essential planning, operational, and intelligence data to the National Military Command Center (NMCC) and the military service command centers on a timely basis to ensure that the National Command Authorities and appropriate military service command authorities are adequately informed."

the Departments of Justice, Defense, and Army all have failed to produce any documentary proof that the President or his appointees ever authorized, or knew about, the kinds of operations which are the subject of the plaintiffs' complaint. How these operations were concealed from responsible civilian officials by military intelligence has been described in testimony before the Ervin hearings.[22]

3. *Surveillance and data-keeping are beyond the Army's needs.* The *amici curiae* submit that when the overbroad analogies to police work are stripped away, Army intelligence will be found to have five legitimate domestic intelligence needs:

(1) Generalized data, for planning purposes, on the patterns of past urban disorders and violent demonstrations which required federal troops. (Such data can be obtained from the after-action reports of task force commanders, Presidential representatives, the Department of Justice, and state and federal riot commissions).

(2) Physical reconnaissance data on potential riot and demonstration areas. (This information includes maps showing approach routes, potential bivouac sites, precinct stations, communications and command centers, and likely areas of disorders).

(3) Liaison information on local law enforcement agencies which may be needed by task force commanders for the purpose of coordinating riot control operations. (Virtually all of this information can be obtained during joint planning sessions and stored with the results of physical reconnaissance in "city packets." Should appraisals of the willingness of local authorities to enforce federal laws and court orders be required, these should be prepared by the Department of Justice).

(4) "Order of battle" type data on the location, size, and actions of rioting mobs in those cities to which federal troops

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[22] *Hearings*, Part I, pp. 202, 204, 216, 281, 282.

have been sent by the President pursuant to 10 U.S.C. Sections 331-334. (This kind of information can be gathered through liaison with local authorities, by uniformed military personnel on patrol, and by riot units stationed throughout the affected area. It does not require the use of plainclothes agents, blacklists, or biographic and organizational data banks).

(5) Information relating to the security of military installations, documents, and personnel. (Examples include reports of espionage, sabotage, unauthorized demonstrations on post, and attempts by civilians to persuade servicemen or civilian employees of the armed forces to disobey the Uniform Code of Military Justice or lawful orders or regulations. However, the conduct of off-post investigations of civilians for purposes not related to the granting of security clearances is properly the task of civilian authorities.)

The *amici curiae* know of no legitimate domestic intelligence need of the armed forces that requires military intelli- to

(1) infiltrate civilian organizations with informants or undercover agents. (The off-post investigation of crimes against the military is the duty of civilian law enforcement agencies).

(2) deploy plainclothes agents to observe demonstrations, conferences, labor union activities, political party conventions, or church meetings.

(3) monitor citizen's band radio transmissions.

(4) maintain card files, dossiers, photographic files, mug books, encyclopedias, and computerized biographic and organizational files on the political and private activities of civilians.

(5) operate nationwide civil disturbance monitoring networks for the purpose of anticipating a Presidential order to

deploy troops or to advise the President when troops should be deployed.[23]

The *amici curiae* raise these points to rebut serious misconceptions in the Justice Department's brief and to support the the plaintiffs' allegations of overbreadth. They wish to emphasize that all representations of the Army's legitimate informational needs and authority remain the subject of intense controversy and can only be resolved at an evidentiary hearing. They submit that the plaintiffs' allegations or overbreadth should be taken as true and any doubts as to their standing resolved in their favor.

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[23]It is the job of the President to tell the Army when to deploy; it is the job of State governors and the Attorney General to advise the President that troops are needed. It is the task of early warning units maintained by the Department of Justice and local and state police departments to tell their respective superiors when defiance of the law has gotten or threatens to get out of hand. According to former intelligence analysts who worked as action officers in the Army Operations Center during the riots and mass demonstrations of 1967, 1968, and 1969, the Army's two nationwide networks for monitoring civil disturbances were of no practical value. By the time an urban riot gets to the point where Federal troops may be required, it has been raging for many hours and has been well reported by the news media, teams of Justice Department lawyers, municipal and state police departments, and the National Guard. It should be noted that none of the civilian after-action reports on the riots of the late 1960s called for the creation of a nationwide Army intelligence network for monitoring demonstrations, labor disputes, church vigils, and similar events on the hypothesis that they might grow into a riot so large that Federal troops would be required to put it down. For responsible discussions of real needs, see generally *Hearings before Special Subcommittee to Inquire into the Capability of the National Guard to Cope with Civil Disturbances, op. cit.*, p. 18, n. 20. Nor has military surveillance of civil disorders ever been proposed by any riot commission in this century. The reports of these commission are summarized by Anthony M. Platt, *The Politics of Riot Commissions, 1917-1970* (New York: Collier, 1971).

II. THIS CASE IS RIPE FOR ADJUDICATION

Throughout its brief, the Justice Department attempts to convey the impression that recent Department of the Army directives have eliminated the overbroad aspects of the surveillance and record-keeping and have rendered this controversy not ripe for adjudication. The *amici curiae* respectfully submit that these statements and arguments are misleading and that any analysis of the extent or sufficiency of purported reforms goes to the question of how the remedy should be fashioned, which is a matter for the District Court to decide.

A. The Case Was Ripe for Adjudication When Filed

In its Statement of the Case, the Justice Department relies heavily on official claims of partial reforms to imply that this case was not ripe for adjudication when it was filed. The omission of important dates and the presentation of purported reforms out of chronological order gives the impression that the activities challenged here were substantially terminated prior to the filing of this lawsuit on February 17, 1970.[24] However, a close examination of the dates of each of the cited directives will show that all were issued after the filing of this lawsuit.[25] Far from establishing that this con-

[24] For example, Section 3 of the Justice Department's statement of the case (Petitioners' brief, 8) begins by depicting a downward trend in civil disturbance reporting from the summer of 1968 to some unspecified time when "[o]bservation of civilian political activities became 'limited to incidents where there [was] a high potential for violence and disorder growing beyond the capability of state and local police and the National Guard to control' (App. 85)." The reference cited, however, is a letter from Under Secretary Beal to Rep. Gallagher stating a new policy as of March 20, 1970—a month after this lawsuit was filed.

For a detailed account of the level of CONUS intelligence operations during this period, see Captain Pyle's testimony before the Ervin subcommittee, *Hearings*, Part I, pp. 156, 202-206.

[25] The proper chronology is:

—January 9, 1970, Captain Pyle's first article published.

(Continued)

troversy was not ripe at the time the complaint was filed, the directives confirm that civilian Pentagon officials agreed with the plaintiffs and the *amici curiae* that Army intelligence had

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–January 21-February 15, 1970. Secretary of the Army receives approximately 30 Congressional inquiries concerning the article.

–February 17, 1970. Plaintiffs file this suit.

–February 18, 1970. Letter from Assistant Chief of Staff for Intelligence to the Commanding General, U.S. Army Intelligence Command, orders destruction of blacklist and discontinuance of civil disturbance spot reports on incidents of only local or regional interest.

–February 19, 1970. Message from Assistant Chief of Staff for Intelligence to the Commanding General, U.S. Army Intelligence Command, directs destruction of all its computerized civil disturbance and biographic data. (Manual files not covered by this order.)

–February 26, 1970. Army General Counsel Jordan assures members of Congress that blacklist has been ordered destroyed and says "No computer data bank . . . is being maintained."

–February 28, 1970. Reports of Fort Monroe computer, CIAD's computer-indexed microfilm archive, and numerous regional and local hard-copy files published in the press.

–March 6, 1970. Secretary of the Army bans all civil disturbance computers and orders subordinates to find and destroy all of them. (Three more eventually discovered).

–March 12, 1970. Plaintiffs file motions for temporary restraining order and preliminary injunction alleging existence of Fort Monroe computer, CIAD's archive, the "Compendium," and scores of regional data banks.

–March 20, 1970. Under Secretary Beal assures Rep. Gallagher that in addition to the Intelligence Command's computer "The only other 'intelligence files' concerning civilians . . . [are] maintained by the Counterintelligence Analysis Division. Beal makes no mention of data banks cited in plaintiffs' March 12 motions.

–June 9, 1970. Letter by Acting Adjutant General to major stateside commands directs them to shift civil disturbance intelligence apparatus to a stand-by basis, gives a general control over its reactivation, orders persons in charge of regional and local data centers to be prepared to destroy or transfer files, and exempts surveillances for "military security" purposes from these requirements.

gotten out of hand and that aspect of its operations exceeded its mission. (*E.g.*, Jordan's letter, App., 54-55, Beal's letter, App. 81, and Beal's affidavit, App. 71-72.)

B. The Controversy is Still Ripe

The Justice Department also argues, somewhat inconsistently, that this controversy is no longer appropriate for judicial resolution because "the military domestic surveillance has been cut back sharply." (Petitioners' brief, 34.) The appeal is to judicial self-restraint; the implication, never explicitly stated, is that this case is moot.

1. *The issue of mootness can only be decided by the District Court.* Whether this case is moot is a question that only a trial judge can decide. The Justice Department's claims of a cut-back in the surveillance are challenged by the plaintiffs' motion papers[26] and have been widely criticized in the press[27] and in Congress.[28] Testimony by the *amici*

[26] For example, the Army General Counsel's letter of February 26, 1970 which claims that "No other computer data bank of civil disturbance information is being maintained . . ." (App. 55) is directly contradicted by the plaintiffs' motions for a temporary restraining order and a preliminary injunction filed on March 12, 1970. They alleged the existence of a computer data bank at Fort Monroe, Va., a microfilm archive at the Counterintelligence Analysis Division in northern Virginia, and scores of regional data banks around the country. Under Secretary Beal's letter to Rep. Gallagher dated March 20, 1970—eight days after the motions were filed—claimed that "The only other 'intelligence files' concerning civilians maintained by the Army [besides those at Fort Holabird] consist of the [microfilm] files maintained by the Counterintelligence Analysis Division." (App. 85.)

[27] *E.g.*, see "Army continuing its political intelligence operation," *Chicago Sun-Times*, March 15, 1970, p. 3; "Despite Denials, Army Sends Spies to Rallies," *Washington Evening Star*, March 28, 1970, p. 1 (*Hearings*, Part I, p. 1648); "Files of Army Spying on Civilians Intact, Say Ex-Agents," Boston *Sunday Herald Traveler*, Jan. 3, 1971, p. 15; "Order to Purge Intelligence Files of Some Civilians Is Rescinded," Baltimore *Evening Sun*, Jan. 28, 1971. A more extensive but by no means complete bibliography of press criticism of the Government's cut-back claims can be found in *Hearings*, Part 1, pp. 138-43.

curiae at the Ervin hearings indicates that what partial reforms have been attempted by the civilian hierarchy of the Pentagon have been met with widespread evasion by military intelligence.[29]

2. *Mere cessation of illegality does not establish mootness.* As this Court held in *Gray v. Sanders*, 372 U. S. 368 (1962):

> . . . the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be 'free to return to . . . [their] old ways.' " *Id.* at 376.

The practices of which the plaintiffs complain are deeply rooted in secret programs of long standing. Army intelligence has been maintaining an unauthorized watch over civilian political activity for nearly 30 years.[30] Nor is this the

[28] *E.g., Cong. Rec.*, March 12, 1970, S3644-50; July 6, 1970 S10557-62; July 29, 1970, S12327-57; Dec. 18, 1970, H12092-103; Dec. 19, 1970, H12150-52; and *Hearings, passim.*

[29] *Hearings*, Part I, p. 156 (concealment of records); pp. 157-59 (intelligence reports showing continued collection activities during November and December 1970 in direct violation of June 9, 1970 directive); p. 160 (non-disclosure of files); p. 162 (continued data-swapping with state agencies as late as Nov. 1970); p. 281 ("blatant lying" by Army intelligence task group to civilian superiors charged by ex-member of group); p. 331 (circumvention of ban on storage of spot reports); p. 462 (Army General Counsel confirms that he was given false information by Army intelligence officers).

[30] Outside the Army, the best documentary evidence of these operations is contained in the private files of Gen. Ralph Van Deman (Ret.), who received military reports on civilian political activity from his former colleagues in Army intelligence throughout the 1940s and early 50s for use in his private anti-Communist crusade. Upon his death in 1952 these files were transferred to the Army. On March 2, 1971 the defendants transferred them to the Senate Internal Security Subcommittee. See Richard Halloran, "Senate Panel Holds Vast 'Subversives' File Amassed by Ex-Chief of Army Intelligence," *New York Times*, Sept. 7, 1971, p. 35. Reproduced in *Hearings*, Part II, pp. 1722-26.

first time that Army intelligence has, without notice to its civilian superiors, overstepped its mission. From 1917 to 1924, the Corps of Intelligence Police maintained a massive surveillance of civilian political activity which involved the use of hundreds of civilian informants, the infiltration of civilian organizations and the seizure of dissenters and unionists, sometimes without charges.[31] That activity was opposed —then as now—by civilian officials on those occasions when they found out about it,[32] but it continued unabated until post-war disarmament and economies finally eliminated the bureaucracy that conducted it.[33]

3. *The Army reserves the right to resume the surveillance.* On the one hand, the Army officials concede that the surveillance was beyond the Army's mission, but on the other they authorize the Director for Civil Disturbance Planning and Operations (a general) to reactivate it whenever he sees fit.[34]

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[31] These operations are meticulously reconstructed from the files of Army intelligence by Prof. Joan M. Jensen in *The Price of Vigilance* (Chicago: Rand McNally, 1968). See especially pp. 112, 274, 282, 244, 276, 279, and 226.

[32] For example, Maj. Omar Bradley was reprimanded by Justice Department officials for joining in a military intelligence raid on a union printing plant in Butte, Mont. The unionists, according to Prof. Jensen, were jailed without charges. *Id.*, p. 227. For other efforts to discipline Army intelligence, see *id.*, pp. 124, 231-32. Professor Jensen concludes: "The attempts at restraint by [President] Wilson, [Attorney General] Gregory, and [Secretary of War] Baker merely drove the Military intelligence underground." *Id.*, p. 124.

[33] *Id.*, p. 288.

[34] The directive of June 9, 1970 (Petitioners' brief, Appendix B, 45-51) does not forbid political surveillance. It merely provides that Army Intelligence shall not undertake it until the Director for Civil Disturbance Planning and Operations finds that "there is a distinct threat of a civil disturbance beyond the capability of local and State authorities to control." (Petitioners' brief, 47). No criteria, such as a governor's request for troops, are set forth to guide the Director in his determination. On the contrary, a "civil disturbance" is defined as any "situation in which a civil jurisdiction is required to apply a

Thus, even if the Justice Department could prove that the surveillance has been stopped and the records destroyed, the question would still remain whether the armed forces have the authority "to exercise a totally unrestricted investigative function in regard to civilians, divorced from the normal restrictions of legal process and the courts." (App. 147.)

Stripped of the specious claims of a nexus between the surveillance and the Army's statutory authority to help quell riots, this is a bald claim of inherent executive power. The courts have consistently rejected such claims in the past, *e.g.*, *Ex parte Milligan*, 71 U. S. 2 (1866), *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952, *United States v. U. S. District Court*, 444 F.2d 651 (6th Cir.) *cert.* granted, 403 U. S. 930 (June 21, 1971). This claim deserves to be rejected now.

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greater than usual degree of police enforcement in order to insure the maintenance of law and order." (Petitioners' brief, 45). Meanwhile, "Army Intelligence elements possessing counterintelligence resources will maintain the capability to collect civil disturbance threat information . . ." (Petitioners' brief, 47).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed and the case returned to the District Court for a full evidentiary hearing.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

Supreme Court, U.S.
FILED
FEB 28 1972
E. ROBERT SEAVER, CLERK

MELVIN R. LAIRD, Secretary of Defense, *et al.*,
Petitioners,

—v.—

ARLO TATUM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

Question Presented

Whether the Court of Appeals was correct in holding that respondents' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity is an unconstitutional burden on plaintiffs' exercise of their First Amendment rights—was justiciable under Article III.

Statement of the Case

The only issue before this Court is whether the complaint states a justiciable claim entitling plaintiffs[1] to a hearing. Because much of the government's Statement of the Case is based upon representations and documents which are not properly part of the record, and because the government ignores many of the material allegations made by plaintiffs, we set out in some detail the allegations of the complaint and the facts which underlie them.

On February 17, 1970, plaintiffs initiated this action on behalf of themselves and others similarly situated challenging the investigation of civilians engaged in lawful political activity by the United States Army (App. 1, 5-12). Plaintiffs complained that their constitutionally protected activities were being investigated "by military intelligence agents, . . . by anonymous informants, and through the use of photographic and electronic equipment" (App. 9), and that the information collected by the Army through such investigation was being "regularly, widely, and indiscriminately circulated . . . to numerous federal and state agencies" (App. 9, 11), published in a "Blacklist" (App. 9), and stored "in a computerized data bank" (App. 9) and "non-computerized records" (App. 10).

The complaint further alleged that the Army's domestic intelligence operations in the civilian community are unauthorized and overbroad, curtail political expression and debate among civilians, inhibit persons from associating with plaintiffs and thereby injure them and others similarly

[1] Respondents are referred to as plaintiffs throughout this brief.

situated by depriving them of their First Amendment rights of free speech and association and their right peaceably to assemble and to petition the government for redress of grievances (App. 11). Plaintiffs also alleged that the Army's surveillance activities abridge their right of privacy guaranteed by the Fourth, Fifth and Ninth Amendments to the Constitution (App. 8-11).

1. Proceedings in the courts below.

Having filed their complaint on February 17, 1970, plaintiffs filed a motion for a temporary restraining order and preliminary injunction on March 12, 1970, which would require the Army to cease investigating them and to deliver to the court *in camera* all blacklists, publications, records, reports, photographs, recordings, data computer tapes and cards, and other materials maintained by the Army, describing and interpreting their lawful political activities. The motion for a temporary restraining order was denied on March 13. On April 22, plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction. The court, however, denied their request to proceed with witnesses and documentary evidence (App. 123), denied their motion for a preliminary injunction, and granted the government's motion to dismiss the complaint for failure to state a claim upon which relief could be granted (App. 126, 128). Defendants never filed an answer.

Plaintiffs appealed the dismissal, and on April 27, 1971, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey in which he was joined fully by Judge Tamm and in part by Judge MacKinnon, reversed

the decision of the District Court on the grounds that the complaint sufficiently stated a cause of action and the controversy between the parties was justiciable (App. 129-48). In remanding the case for full evidentiary proceedings on the motion for a preliminary injunction, the Court of Appeals instructed the District Court to determine (1) the nature and extent of the Army domestic intelligence system, the methods of gathering information, its content and substance, the methods of retention and distribution, and the recipients of the information; (2) what part of the Army domestic intelligence system is unrelated to or not reasonably related to the performance of the Army's statutory and constitutional mission; (3) whether the existence of any overbroad aspects of the intelligence gathering system has or might have an inhibiting effect on the plaintiffs and others similarly situated; and (4) what relief is called for in accordance with the evidence (App. 147-48).

2. Plaintiffs' unchallenged allegations which must be broadly construed and accepted as true in face of the government's motion to dismiss.

A. *Allegations about the plaintiffs and the Army's investigation of their political activities.*

The plaintiffs are four individuals and nine unincorporated associations engaged in lawful political activity, including but not limited to union organizing, public speaking, peaceful assembly, petitioning the government, newspaper editorializing, and educating the public about political issues (App. 6-7). They include government

employees,[2] attorneys,[3] clergymen,[4] pacifists and pacifist organizations,[5] veterans of the armed forces,[6] and groups opposed to American involvement in the war in Southeast Asia[7] (App. (6-7). Members of the plaintiff associations also include current and prospective government employees, students, professionals, and others whose status, employment and livelihood are threatened by the Army's maintenance of files and dossiers on their political activities and associations (App. 10). All of the named plaintiffs have been subjects of political surveillance, and all are believed to be subjects of reports, files, or dossiers maintained by the Army (App. 9).

Exhibit A to the complaint is a document entitled, "USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12," containing "items of intelligence interest for the period 0600 hrs., Monday, 11 March 68 to 0600 hrs., Monday 18 March 68" (App. 14). This document is a report on the constitutionally protected political activities of plaintiffs and others similarly situated and, upon information and belief, is representative of similar reports

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[2] The American Federation of State, County & Municipal Employees.

[3] Conrad Lynn and Benjamin N. Wyatt, Jr.

[4] Rev. Albert B. Cleage, Jr. and Clergy and Laymen Concerned about the War in Vietnam.

[5] War Resisters League; Arlo Tatum, the Executive Secretary of the Central Committee for Conscientious Objectors; and Women's Strike for Peace.

[6] Veterans for Peace in Vietnam.

[7] The Vietnam Moratorium Committee; the Vietnam Week Committee of the University of Pennsylvania; the Vietnam Education Group; and Chicago Area Women for Peace.

prepared weekly by military intelligence units. Such reports were widely and indiscriminately distributed to civilian and military officials within the Department of Defense, to civilian officials in federal, state and local governments, and to each military intelligence unit and troop command in the Continental United States as well as Army headquarters in Europe, Alaska, Hawaii and Panama,[8] and were stored in one or more data banks in the Department of the Army (App. 9, 26-27). Typical of the reports concerning the plaintiffs' activities are the following:

> FRIDAY, 15 MARCH 1968:
> PHILADELPHIA, PA.: A. *THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE* SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. *CONRAD LYNN*, AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEET-

[8] Exhibit A is expressly directed to: "CG FIRST ARMY (THRU 109TH MI GP); CG, THIRD ARMY (THRU 111TH MI GP); CG FOURTH ARMY (THRU 112TH MI GP); CG, FIFTH ARMY (THRU 113TH MI GP); CG, SIXTH ARMY (THRU 115TH MI GP); CG, XVIII ABN CORPS; CG, III CORPS (THRU DCSI FOURTH ARMY); CG, MDW (THRU 116TH MI GP); CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY); CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY); CG, 82D ABN DIV (THRU XVIII ABN CORPS); CG, 5TH INF DIV (THRU DCSI FIFTH ARMY); CG, USARHAW (THRU 710TH MI DET); CG, FT DEVENS (THRU 108TH MI CP); CO, 902D MI GP (THRU 116TH MI GP); CO 108TH MI GP; CO, 109TH MI GP; CO, 111TH MI GP; CO, 112TH MI CP; CO, 113TH MI GP; CO, 115TH MI GP; CO, 116TH MI GP; CO, 710 MI DET; DIRECTOR ANMCC (PASS TO DIA ELEMENT); USAINTC LNO, PENTAGON." Eleven other recipients are indicated by code (App. 13-14).

ING. FOLLOWING THE QUESTION AND ANSWER PERIOD ROBERT EDENBAUM OF THE *CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS* STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.

B. *REV. ALBERT CLEAGE, JR.* THE FOUNDER OF THE BLACK CHRISTIAN NATIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS (App. 17).[9]

B. *Allegations of injury to the plaintiffs.*

Paragraph 15 of the complaint alleges that "[t]he purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and others similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment by *invading their privacy, damaging their*

[9] The peaceful political activities of members of the plaintiffs' class are also reported in the Weekly Intelligence Summary, *e.g.*:

WEDNESDAY, 13 MARCH 1968

BROOKLYN, N.Y.: ABOUT 35 PERSONS PARTICIPATED IN A DEMONSTRATION AT THE MAIN GATE OF FORT HAMILTON TO PROTEST THE SCHEDULED INDUCTION OF PETER BEHR. MANY OF THE PROTESTORS DISTRIBUTED LEAFLETS AND FLOWERS TO PERSONS ENTERING THE FORT. THE DEMONSTRATION LASTED APPROXIMATELY ONE AND ONE HALF HOURS AND ENDED WITHOUT INCIDENT (App. 15).

reputations, adversely affecting their employment and their opportunities for employment, and in other ways" (App. 10). (emphasis added). The specific deterrent induced by the Army's surveillance activities is the plaintiffs' "fear [that] they will be made *subjects of reports* in the Army's intelligence network, that *permanent reports of their activities will be maintained* in the Army's data bank, that *their 'profiles' will appear in the so-called 'Blacklist'* and that all of this information will be *released to numerous federal and state agencies* upon request" (App. 11) (emphasis added).

The government's Statement of the Case ignores these allegations of injury, and attempts through the introduction of highly questionable allegations of fact which have not been subjected to cross-examination in court, to convey the impression that Army surveillance is justified.[10] But in appellate review of a successful motion to dismiss, the plaintiffs' allegations of injury must be broadly con-

[10] Rule 12(b)(6) of the Federal Rules of Civil Procedure states, in part: "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." However, having clearly stated that it was treating the government's motion as one made pursuant to Rule 12(b)(6) (App. 128), the District Court was bound to exclude matters outside the pleadings in determining the sufficiency of the complaint. Wright & Miller, *Federal Practice and Procedure*, § 1356 (1969). To do otherwise would have required the court to give plaintiffs ". . . reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b)(6). Having failed, therefore, to give plaintiffs such opportunity to be heard, having excluded their witnesses, and having characterized the government's motion as one brought pursuant to Rule 12(b)(6), the District Court could not have admitted the government's affidavits in considering the motion to dismiss. It should be noted that the government filed four affidavits on April 20, 1970, only two days prior to the District Court hearing. Those affidavits are frequently cited in the government's brief.

strued and taken as true[11] unless they are stated as conclusions of law or are inconsistent or unwarranted deductions of fact.

Specific constitutional injuries to the plaintiffs are legion on the face of the pleadings. Adverse effect on the government employment of members of the plaintiff American Federation of State, County and Municipal Employees stems from their inclusion in Army files and dossiers on civilians "who might be involved in civil disturbance situations"—files which are disseminated by the Army to federal and state agencies (App. 11, 26, 54). Damage to the

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[11] In reviewing the sufficiency of a complaint on a motion to dismiss, this Court has consistently held that "the material allegations of the complaint are taken as admitted." *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969). See also, *California Motor Transport* v. *Trucking Unlimited*, 40 U.S.L.W. 4153, 4155 (January 13, 1972); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951).

Since Rule 8(a)(2) of the Federal Rules of Civil Procedure only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," the courts have generally looked with disfavor on Rule 12(b)(6) motions. This is especially true when a "unique" legal theory is propounded (App. 139). See *Shull* v. *Pilot Life Ins. Co.*, 313 F.2d 445, 447 (5th Cir. 1963). In assessing the sufficiency of a complaint, this Court has consistently adhered to the rule enunciated in *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957):

> "In appraising the sufficiency of a complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Therefore, recognizing " . . . that the Federal Rules of Civil Procedure, do not require a claimant to set out in detail the facts upon which he bases his claim," *Conley* v. *Gibson*, *supra*, at 47, the test is whether the material allegations of the complaint, liberally construed, with all ambiguities resolved in favor of the plaintiff, are sufficient to support a claim upon which relief can be granted. See Wright & Miller, *supra*, § 1357, fns. 75-77; Barron & Holtzoff, 1A *Federal Practice and Procedure* § 356, fn. 93 (1960).

plaintiffs' reputations is illustrated in the case of Conrad Lynn, a New York attorney experienced in litigation under the Military and Selective Service Act, who is characterized in an Army intelligence file as "an author of draft evasion literature" (App. 17). A similar characterization is made in an Army file with regard to a member of the Central Committee for Conscientious Objectors (App. 17). The characterization of persons, including plaintiffs and members of their class, whose names appear on an Army "identification list" of civilians (App. 9-11, 25, 27), as individuals "who might be involved in civil disturbance situations" (App. 54) constitutes an immediate threat to their employment and damage to their reputations within the precise terms of the complaint (App. 10). Finally, the injuries and threatened injuries to the privacy, employment and reputations of the plaintiffs are visited upon them solely because they have exercised their First Amendment rights, and they are thus deterred from further vigorous exercise of those rights (App. 10-11), in addition to being deprived of their freedom of association with those citizens who are deterred from "free and open discussion of issues of public importance" (App. 11) for fear of becoming a target of defendants' surveillance network (App. 10-11).

C. *Allegations about the scope of the Army's domestic intelligence system.*

Plaintiffs allege and the government does not deny that the Army has stationed intelligence agents in more than three hundred domestic intelligence units throughout the United States (App. 23, 52); that these agents have intruded themselves into civilian politics by monitoring, re-

porting and interpreting the political and often private activities and associations of civilians (App. 8-10, 23-27); that the Army Intelligence Command maintains an undetermined number of computerized and non-computerized data banks on political protests occurring any place in the United States (App. 9-10, 23); that the information on civilian political protests collected by the Army Intelligence Command has been widely and indiscriminately disseminated to military and civilian agencies of government (App. 9, 27); that the Army Intelligence Command has compiled an identification Blacklist including photographs of civilians "who might cause trouble for the Army" (App. 9, 25); and that Army intelligence agents have infiltrated civilian political organizations[12] and used improper methods to acquire confidential information about private persons[13] (App. 9, 23-24).

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[12] Although the plaintiffs were denied an evidentiary hearing in the District Court, they were prepared to introduce evidence, through the testimony of witnesses who were in the courtroom that Army intelligence agents had infiltrated private social, political and religious groups exercising their freedom of association and their right of privacy. Plaintiffs' counsel made an offer of proof that one such witness, Oliver Allen Peirce, who had served in the Fifth Division, Military Intelligence Detachment at Fort Carson, Colorado, from May 1, 1969 to December 19, 1969, would testify "that he was instructed to infiltrate a group known as the Young Adults Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization in the Colorado Springs area; [and] that he was instructed to become a member of this group and to make regular reports on what was going on . . ." (Transcript of Proceedings in the District Court, April 22, 1970, at pp. 29-30).

[13] It is alleged in Appendix B to the complaint, for example, that agents of the 108th Military Intelligence Group in New York City have acquired confidential academic records of students at Columbia University without the knowledge or consent of the students or the University (App. 23-24).

During the two months between the filing of the complaint on February 17, 1970 and oral argument on plaintiffs' motion for a preliminary injunction and on the government's motion to dismiss on April 22, 1970, additional aspects of the Army's surveillance system were revealed through statements made by Army spokesmen under pressure of Congressional inquiry, this lawsuit, and adverse publicity. In letters dated February 25 and 26, 1970 and addressed to plaintiffs' counsel and more than thirty members of Congress (App. 51-55), Robert E. Jordan III, then Army General Counsel, acknowledged that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission requirements" (App. 54). Mr. Jordan admitted that the Army Intelligence Command maintained a computerized data bank at Fort Holabird, Maryland concerning civilian political activity throughout the nation (App. 52, 55), and distributed an "identification list which included the names and descriptions of individuals who might be involved in civil disturbance situations" (App. 54).[14]

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[14] Although Mr. Jordan asserted that the Fort Holabird computerized data bank would be "discontinued," he made no reference to duplicate and additional information located at other Army record centers (App. 51-55). He also stated that "[n]o computer data bank of civil disturbance information is being maintained" (App. 55), which the plaintiffs contend was inaccurate. Because of the vagueness of Mr. Jordan's letter, Senator Sam J. Ervin, Chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, wrote to the the Secretary of the Army on February 27, 1970 to request further information about the scope of the Army's domestic surveillance system (App. 61-62). Senators Abraham Ribicoff and William Fulbright and Congressman Cornelius Gallagher similarly pressed the Secretary for information (App. 63-65, 74-75).

To answer mounting Congressional criticism, Under Secretary of the Army Thaddeus Beal wrote to Congressman Gallagher and Senator Ervin on March 20, 1970 (App. 76-86). He disclosed the existence of a second "identification list . . . on individuals and organizations" prepared by the Counterintelligence Analysis Division (App. 81). Mr. Beal also acknowledged the maintenance by the Army of microfilm data banks on civilian political activity, and stated that such data banks would continue to be compiled and maintained (App. 81). Apart from these admissions, however, the Under Secretary denied the existence of any other intelligence files. Eight days earlier, however, in their motion papers for a temporary restraining order and preliminary injunction, plaintiffs had specifically charged that the defendants were concealing the existence of:

(1) a second computerized national domestic intelligence data bank, much larger than the one at Fort Holabird, maintained by the Continental Army Command at Fort Monroe, Virginia (App. 48);

(2) regional intelligence data banks including files and documents on political activities of individual citizens and organizations maintained by the First, Third, Fourth, Fifth, and Sixth Armies, and the Military District of Washington, D.C.; and by the 108th, 109th, 111th, 112th, 113th, 115th, 116th, and 902nd Military Intelligence Groups, and the 710th Military Intelligence Detachment, at Fort Devens, Massachusetts; Fort Meade, Maryland; Fort MacPherson, Georgia; Fort Sam Houston, Texas; Fort Sheridan, Illinois; San Francisco, California; and Honolulu, Hawaii, respectively (App. 48);

(3) cards and documents stored at the Headquarters of the Army Intelligence Command from which the Fort Hola-

bird domestic intelligence data bank was organized and made operable (App. 48);

(4) a second blacklist, larger than the first, known as the "Compendium" and published by the Counterintelligence Analysis Division of the Army in two volumes entitled, *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest,* describing politically active individuals and organizations unassociated with the armed forces or with civil disturbances, but believed by the Army to be sources of "dissidence" (App. 48).

3. Events subsequent to the proceedings in the District Court of which the Court should take notice for the sole purpose of determining the justiciability of plaintiffs' claims.

The government's brief discusses events subsequent to the filing of this lawsuit and facts outside the scope of the proceedings in the District Court for the purpose of bolstering that court's decision. Thus, it claims that the Army's investigative activities have been discontinued and that the files and dossiers resulting therefrom have been destroyed (Gov't. Brief, pp. 9-11, 34). It also argues that the allegations of injury to the plaintiffs are unsubstantiated by facts in the record (*Id.,* p. 20). Whether these contentions spring from the government's desire to broaden the issues before this Court or its unwillingness to have the Court test the sufficiency of the pleadings on their face, the plaintiffs are entitled to present a rebuttal. In doing so they request the Court to take notice of two events subsequent to the District Court proceedings in order to complete the record in this case: (1) the transcript of a hearing on a motion for a preliminary injunction made by mem-

bers of the plaintiffs' class in a case involving the same subject matter as the case at bar, *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal argued *sub nom. ACLU* v. *Laird,* 71-1159 (7th Cir. 1972), and (2) Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess., February 23-25 and March 2-4, 9-11, 15, and 17, 1971 [hereinafter "the Ervin Hearings."][15]

A. *The partial reforms cited by the government do not prove that the Army's investigation of civilian politics has been discontinued and that the files and dossiers resulting therefrom have been destroyed.*

The government's Statement of the Case attempts to convey the impression that the controversy before the Court is moot.[16] Under these circumstances the plaintiffs are entitled to go outside the record to demonstrate that the case is not moot.[17]

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[15] Even for the purpose of deciding issues on the merits, this Court has taken notice of legislative committee reports, *Carolene Products Co.* v. *United States,* 323 U.S. 18, 28 (1944); cf. *Elliott* v. *Home Loan Bank Board,* 233 F. Supp. 578 (N.D. Cal.) rev'd on other gds., 386 F.2d 42 (9th Cir. 1964), cert. denied 390 U.S. 1011 (1965), and may of course take notice of the record in other proceedings within the federal judicial system, *Brown* v. *Board of Education,* 347 U.S. 483 (1954); see also *Paul* v. *Dade County,* 419 F.2d 10 (5th Cir. 1969), *cert. denied,* 397 U.S. 1065 (1970).

[16] The government having injected the issue of mootness into this case, the plaintiffs would be entitled on remand to offer evidence addressed to that issue. The government, therefore, cannot be heard to object to any proof by the plaintiffs that the Army continues to compile and maintain files and dossiers on civilian political activity, Army regulations to the contrary notwithstanding. Cf. *SEC* v. *Rapp,* 304 F.2d 786 (2d Cir. 1962); *Kirk* v. *United States,* 232 F.2d 763 (9th Cir. 1956).

[17] *See* discussion of mootness at pp. 88-91, *infra.*

The vagueness of the Army directives initiating domestic surveillance, and the equivocal directives purporting to reduce it are exhaustively documented in the Ervin Hearings.[18] Contrary to the assertion by the government that Army surveillance focused on "selected public gatherings . . . that were thought to have a potential for civil disorder" (Gov't. Brief, p. 5), surveillance was neither selective, nor restricted to public gatherings, nor limited to even the broadest definition of potential civil disorders.[19] The directives setting up the Army surveillance program were extremely broad, unlike the narrower "family of contingency plans" referred to by the government in its brief (*Id.*), which related only to the logistics of troop movements.[20]

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[18] *See* Ervin Hearings, Part I, pp. 160, 175, 246-47, 258-59, 280-81, 297, 315, 323, 327, 330, 385, 418, 430; Transcript of Proceedings in the District Court, *ACLU* v. *Westmoreland, supra* [hereinafter "*Westmoreland* Transcript"], p. 629. See also the following colloquy, at p. 418, between Senator Ervin and Secretary Froehlke concerning the latter's prepared statement about the scope of Army surveillance:

> Senator ERVIN: This statement states in effect that it was a very unfortunate thing that many of the things which the military did were not spelled out in any kind of written guideline, and many of them were the result of oral orders and many of them were the result of conversations between the military and civilian law enforcement officers. Is that a fair statement?
>
> Mr. FROEHLKE: That is a fair statement.

[19] Ervin Hearings, Part I, pp. 111-12, 176, 247, 263, 265, 267, 299, 317-18, 337, 376; *Westmoreland* Transcript, pp. 249, 257, 619, 758-59, 818, 847-48.

[20] Ervin Hearings, Part I, pp. 111-12, 261, 280-81, 297, 299, 421, 872; *Westmoreland* Transcript, pp. 201-03, 260, 330, 345, 374, 1066. Secretary Froehlke testified, at p. 421 of the Ervin Hearings, that ". . . both the collection plans of February 1, and May 2, [1968] could be interpreted in such a way that would permit surveillance of almost anybody who is active in a community where there was a civil disturbance. Both plans were very broad." Indeed, as former

While the scope of the Army's investigation of civilians was never defined by civilian authorities prior to the initiation of this lawsuit,[21] subsequent attempts by the Army to destroy the fruits of its investigation have been substantially ineffective. The government maintains, for example, that "spot reports"—the raw data of surveillance—are "destroyed 60 days after publication" (*Id.*, p. 10; App. 80), but it does not disclose that the raw data is first transferred to "agent reports," "after-action reports," "biographic reports," and "summaries of investigations".[22] Furthermore, although the investigative data abstracted from spot reports was no longer computerized after February 1970, non-computerized domestic intelligence reports continue to be maintained by the Army.[23] Similarly, the government contends that the identification list[24] was destroyed in February 1970 (*Id.*, p. 10), but fails to explain that the "order . . . to return" (*Id.*) the 300 copies of the list outside the Army was inexplicably changed at the last minute to an order to destroy all copies, which the Hearings testimony shows has not been carried out.[25] Finally, the government

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agent Joseph Levin, Jr. testified, the breadth of the collection plans resulted in even broader instructions to the agents in the field: "It is the nature of the Army system to expand on requirements as each directive travels down the chain of command. . . . [I]ntelligence requirements at field office level rarely bore any resemblance to the order issued from Fort Holabird or even Group Headquarters." *Id.*, p. 297.

[21] Ervin Hearings, Part I, pp. 115, 146, 151, 154, 156, 163, 202, 206-07, 210, 217-18, 322, 454, 462.

[22] *Id.*, pp. 177, 179, 180, 211, 234-35, 238, 264, 331, 390, 465.

[23] *Id.*, pp. 156, 159, 209-10.

[24] *Id.*, pp. 148, 166, 186, 191-92, 207-08, 211-13, 226-27, 249, 266-67, 269, 277, 455-56, 866; *Westmoreland* Transcript, pp. 455, 887-91, 1029.

[25] Ervin Hearings, Part I, pp. 216, 238, 249, 279-80, 394, 428.

points to a policy letter from the Adjutant General as evidence that domestic surveillance "was severely restricted in June 1970" (*Id.*, pp. 9, 45-52). Apart from this bald assertion, however, there is no basis for concluding that the letter eliminated the activities complained of in this lawsuit. Indeed, as Senator Ervin remarked in a letter to the Secretary of the Army, "the exceptions, qualifications and lack of criteria in your policy letter could lead the average citizen . . . to wonder just how much of a change it represents in government policy." [26]

Other errors and omissions in the government's Statement of the Case cast further doubt on its claim that Army surveillance has ceased. The assertion, for example, that "surveillance activity decreased" after the "Spring and Summer of 1968" (*Id.*, p. 9) flies in the face of the most comprehensive of all Army Collection Plans authorizing political surveillance, which was issued in May of 1969.[27]

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[26] Ervin Hearings, Part II, p. 1102. See also *Id.*, Part I, pp. 102, 214-15, 222, 281, 435; *Westmoreland* Transcript, pp. 536, 540, 912.

[27] Ervin Hearings, Part II, pp. 1731-37. The Plan includes, inter alia, the names and identification numbers of the following organizations to be monitored:

American Friends Service Committee (AFSC)	ZB 00 02 00
Americans for Democratic Action (ADA)	ZA 00 17 81
Committee for Non-Violent Action (CNVA)	ZB 00 87 79
Congress of Racial Equality (CORE)	ZB 00 14 77
Clergy and Laymen Concerned About Vietnam (CLCAV)	ZB 50 05 27
Fifth Avenue Vietnam Peace Committee (FAVPC)	ZB 02 12 68
Institute for the Study of Non-Violence (ISNV)	ZB 50 03 86
Interfaith Peace Mission (IPM)	ZB 50 10 64
National Association for the Advancement of Colored People (NAACP)	ZA 00 04 02
National Committee for a Sane Nuclear Policy (SANE)	ZA 00 90 26

(*footnote continued on following page*)

By the same token, the government's claim that political intelligence data and the special identification lists "were kept apart" from the Army's investigative files of "personnel, civilian employees and contractors' employees" (*Id.*, p. 8), cannot withstand evidence that the fruits of Army surveillance can now be found in the investigative files of a host of military and civilian agencies.[28]

B. *Plaintiffs have a right to file supplemental pleadings to substantiate their allegations of injury with facts unknown at the time the complaint was filed.*

Although their allegations of injury are more than sufficient to state a cause of action, plaintiffs would be entitled on remand to file supplemental pleadings to bring their complaint up to date.[29] There are at least five categories of

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Southern Christian Leadership Conference (SCLC)	ZB 00 87 94
Student Non-Violent Coordinating Committee (SNCC)	ZB 01 13 29
Veterans and Reservists to End the War in Vietnam (VREWV)	ZA 02 17 70
Veterans for Peace in Vietnam (VPV)	ZB 02 18 03
Women Strike for Peace (WSP)	ZB 01 36 95

[28] This is understandable in light of testimony in the Ervin Hearings that political intelligence data collected as "civil disturbance information" have been filed in security clearance dossiers. Ervin Hearings, Pt. I, p. 230. See also, *Id.*, pp. 151, 156, 160, 212, 216, 223, 225, 234, 259, 275, 323, 428, 428, 465; *Westmoreland* Transcript, pp. 849-50.

[29] An appellate court may, on proper showing, remand a case expressly for the purpose of permitting a party to file supplemental pleadings under Rule 15(d) of the Federal Rules of Civil Procedure, "setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented." See, e.g., *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966); *Southern Pacific Railroad* v. *Conway*, 115 F.2d 746 (9th Cir. 1940).

allegations pertaining to their injury which the plaintiffs can now substantiate in even greater detail with witnesses who testified at the Ervin Hearings and at the evidentiary hearing in *ACLU* v. *Westmoreland*. First, the plaintiffs can prove the Army has conducted surveillance of wholly private activity;[30] second, that the Army's files and dossiers on civilians have been misused and indiscriminately disseminated;[31] third, that their employment or prospective employment within or without the government is jeopardized by such misuse and indiscriminate dissemination of files and dossiers on civilian political activity;[32] fourth, that their reputations have been damaged and defamed by the Army's investigative activities;[33] and finally, that as a result of the Army's investigation of civilian politics, members of the plaintiff organizations have been deterred from continuing their membership and prospective members have been dissuaded from joining.[34]

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[30] Ervin Hearings, Part I, pp. 171, 185, 198, 200-01, 204, 213, 217, 223, 234, 255, 285-86, 290-91, 294-95, 300, 306, 308-09, 387, 445; *Westmoreland* Transcript, pp. 178-79, 205-06, 216-18, 244, 269, 299-300, 311, 359, 373, 515, 560.

[31] Ervin Hearings, Part I, pp. 151, 153-55, 162, 166, 187, 191-92, 195, 211, 224, 234, 266, 270, 319-20, 460, 465; *Westmoreland* Transcript, pp. 103, 156, 179, 214-16, 653, 708, 759, 1016, 1069.

[32] Ervin Hearings, pp. 183, 231.

[33] *Id.*, pp. 131, 141, 183, 232, 266, 342; *Westmoreland* Transcript, pp. 64, 486-87, 498-99.

[34] *See, e.g.*, Ervin Hearings, Part I, p. 231; *Westmoreland* Transcript, pp. 41, 492, 499.

Summary of Argument

The issues presented by the government are illusory. In the court below the government argued that plaintiffs' claims were not justiciable in the sense that justiciability requires a judicially identifiable right and breach of duty, and a remedy within the power of the court. That argument has been abandoned here. The government now shifts its ground to focus on a different aspect of the justiciability doctrine, arguing that plaintiffs' claims are unripe because they lack sufficient focus and concreteness to be presented in an adversary context. Plaintiffs demonstrate that this position is no sounder than the government's earlier one.

I.

Justiciability

The plaintiffs are being spied upon and monitored by the Army and they challenge the Army's right to treat them in that way. So viewed, it is hard to understand how the government can deny that this case is presented in a context "that imparts the necessary concrete adverseness" consistent with the limitations of Article III. *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). Nothing more is needed or foreseeable which would make this case more ripe for adjudication.

The government relies on the dictum of *Flast, supra,* forbidding adjudication of "generalized grievances" about the conduct of government, 392 U.S. at 106; but *Flast* itself was much nearer to being a generalized grievance against government than the instant case. There the plain-

tiffs were challenging a nationwide governmental program which affected them equally with all other citizens. Here, plaintiffs are part of the comparatively narrow group upon which the Army's surveillance system focuses. See also *Baker* v. *Carr*, 369 U.S. 186 (1962), *Evers* v. *Dwyer*, 358 U.S. 202 (1958), cases closer to being "generalized grievances" against government than the instant one.

Furthermore, in numerous cases over the past decade, this Court has emphasized that normal barriers to justiciability must be lowered where government action results in a present inhibition on the exercise of First Amendment rights. *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).

Indeed, in none of the many cases challenging governmental surveillance of political activists now being litigated around the country has any court save the District Court below doubted the justiciability of the question, although on the merits courts have arrived at a variety of conclusions. See, e.g., *Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678 (1970), remanding a suit against the New Jersey State Police for an evidentiary hearing. In fact, while the government challenges the justiciability of this attack on the Army's domestic intelligence program, it is also litigating the merits of a challenge to the same program, which arose in the Northern District of Illinois. *ACLU* v. *Westmoreland*, 70 Civ. 3191 (N.D. Ill., 1970), *appeal argued sub nom. ACLU* v. *Laird*, 71-1159 (7th Cir., 1972).

If the government is arguing that plaintiffs' claims of abridgment of First Amendment rights cannot be substan-

tiated, their arguments are premature. It would be improper at this point in the proceedings for this Court to hold that the Army's surveillance program has not deterred the exercise of First Amendment rights. Plaintiffs are at least entitled to an evidentiary hearing on this question.

Furthermore, in many cases over the past decade, this Court has taken notice, without demanding specific proof, of the chilling effect on First Amendment rights caused by governmental programs which reach overbroadly into areas of protected speech and association. Moreover, the validity of the Court's assumptions in those cases is documented in the professional literature of the social sciences. See *Keyishian* v. *Board of Regents*, 385 U.S. 589, 607 (1967).

It is plaintiffs' position, therefore, that if they can prove their allegations about the Army's behavior, a court may in fact assume a chilling effect; but in the alternative, plaintiffs must be afforded the opportunity to offer evidence of that chill. In either event, this case would have to be remanded for a full evidentiary hearing.

Separate and apart from the injury to First Amendment rights involved in this case, courts have traditionally recognized as justiciable complaints about invasions of privacy such as plaintiffs describe. Every individual has a right to be free from needless invasions of his privacy and the plaintiffs' allegation that the Army has invaded their private lives (App. 10) is alone sufficient to invoke their right to judicial protection.

The justiciability of plaintiffs' claims is enhanced by the fact that the Army's surveillance program constitutes

an unauthorized military incursion into civilian affairs. Cognizant of the complaint in the Declaration of Independence that the King had "effected to render the military independent and superior to the civil power," our courts have always been alert to invoke their equitable powers where the Army has acted beyond its constitutional and statutory mission and intruded into civilian affairs.

II.

Standing

The government argues that even if the claims asserted are justiciable, these plaintiffs lack standing to raise them because they are not the persons who are "chilled and cowed" by the Army's surveillance program. Plaintiffs have made no such concession. An isolated statement taken out of context from counsel's oral argument in the Court of Appeals while discussing a different issue, does not constitute part of the evidence in this case. Plaintiffs do concede only that they are not so chilled and cowed that they are afraid to come into court to protect their First Amendment rights. What is uncontested at this time and must be accepted as true for these proceedings is that plaintiffs are deterred in the full and vigorous exercise of their rights.

Furthermore, this Court has fashioned "an exception to the usual rules governing standing" in cases involving First Amendment freedoms, *Dombrowski* v. *Pfister*, 380 U.S. at 486, recognizing, as has the Supreme Court of New Jersey, that ". . . . there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters." *Anderson* v. *Sills*, 56 N.J. at 221.

Plaintiff individuals and organizations clearly have standing to complain about the harm done to their own First Amendment rights when others less bold than they are deterred from associating with and assisting plaintiffs in their political activities. For those plaintiffs involved in anti-war activities, for example, any diminution of anti-war activism, as a result of Army surveillance, undermines their First Amendment right to persuade their fellow citizens to their point of view.

It is, therefore, the height of sophistry to suggest as the government does, that "millions of Americans" can be deterred from the political activities in which plaintiffs are engaged but that unless plaintiffs are themselves deterred their First Amendment rights are unimpaired. The First Amendment promises more than the right to be a lone voice in the wilderness. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250-51 (1957). Additionally, plaintiff organizations have standing to represent the rights of their members. *NAACP* v. *Alabama,* 357 U.S. 449 (1958).

With that in mind, plaintiffs clearly meet the test for standing set down by the Court in *Association of Data Processing Service Organization, Inc.* v. *Camp,* 397 U.S. 150, 152-53 (1970), in that they have (1) alleged "injury in fact, economic or otherwise", and (2) can show that the interests they seek to enforce are "within the zone of interests to be protected . . . by the . . . constitutional guarantee in question." There can be no doubt that the interests plaintiffs seek to protect in this case are within the First Amendment zone, or, as the issue was defined in *Flast* v. *Cohen,* 392 U.S. at 102, that there is a "logical nexus" between plaintiffs' status as active political dis-

senters and the First Amendment claims they seek to adjudicate.

Even apart from the First Amendment questions presented by this case, plaintiffs have standing to adjudicate the invasion of their privacy caused when military agents monitor their activities and keep dossiers on their private and public lives.

For all of the above reasons, Judge Wilkey was correct when he wrote for the court below that plaintiffs "have standing to seek redress in court and will provide the necessary adversary interest that is required by the standing doctrine . . ." (App. 140 n. 17).

ARGUMENT

Introduction

Stripped of technicalities, the question before the Court is whether the Army may abridge First Amendment rights by an unconstitutional program in excess of its statutory authority while remaining immune from judicial review. The answer to that question must be "No"; otherwise, as this Court noted more than a hundred years ago in a similar context, "republican government is a failure, and there is an end of liberty regulated by law," for "civil liberty and this kind of martial law cannot endure together. . . ." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 124-125 (1866). Fortunately, republican government and civil liberty continue to exist in this country, thanks in large part to decisions of this Court in cases such as *Milligan*.

This Court has always subscribed to the doctrine that "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). This is, as Chief Justice John Marshall said, "the very essence of judicial duty." *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803). The fact that the constitutional denial is caused by the action of some other branch of the federal government has not deflected the Court from the exercise of that sworn duty, even in the most difficult and awkward circumstances. See *Marbury* v. *Madison, supra; Youngstown Sheet and Tube* v. *Sawyer*, 343 U.S. 579 (1952); *Powell* v. *McCormack*, 395 U.S. 486 (1969). In this way the Court has remained true to the advice of James Madison to stand as an "impenetrable bulwark against every assumption of power which threatens our liberties." James Madison, 1 Annals of Congress 439. *New York Times* v. *United States*, 403 U.S. 713, 714 (Black, J., concurring).

Thus it is not surprising that the government attempts to conceal the real issue in this case behind a barrage of technicality. But it cannot hide the fact that, for purposes of this proceeding, it must concede both the illegality of the Army's conduct and the serious damage that conduct has done to rights of free speech and association. That is the meaning of the justiciability issue raised by the government—that the Army is immune from any judicial control of the lawless and injurious course of conduct challenged by plaintiffs.

Under the government's theory of justiciability, that course of conduct remains immune from judicial review unless and until some specific individual can prove not

only that he lost his freedom of speech as a result, but also that he lost a job or went to jail. This immunity presumably continues even until a time when:

> [Y]ou had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.[35]

The government would then still assert the issue was nonjusticiable.[36] Plaintiffs insist our jurisprudence is made of sterner stuff, and requires judicial intervention at the point at which First Amendment rights are first impaired.

It is not a novel theory to assert the inextricable link between the freedoms of speech and association protected by the First Amendment and the right to be free from military surveillance asserted by the plaintiffs. More than 150 years ago, a noted historian wrote:

> Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators —who shall say they are free? Nothing is more revolting to Englishmen than the espionage which forms

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[35] Orwell, "1984," The New American Library, Signet (pocketbook) edition, 7. See also the warning of Prof. Arthur Miller in his recently published study, *The Assault on Privacy* (1971, University of Michigan Press):

> [T]here is certain to be a time in the very near future when the application of the technology to personal data will reach an acceleration point after which our capability of managing information flow will be seriously impaired (at 209).

[36] Compare footnote 17 in *Flast* v. *Cohen*, 392 U.S. 83, 98 (1968).

> the heart of the administrative system of continental despots. It haunts men like an evil genius, chills their friendships and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. [May, *Constitutional History of England*, 275 (1813).]

This Court has long adhered to the principle that the First Amendment's guarantee of "associational freedom . . . creates a preserve where the views of the individual are made inviolate." *Schneider* v. *Smith*, 390 U.S. 17, 25 (1968). It would surely be the "hallmark of a police state," *Shuttlesworth* v. *Birmingham*, 383 U.S. 87, 91 (1965), if the military were to win exemption from judicial control for the kind of domestic espionage program at issue here, and it would convert Mr. Justice Douglas' warning into a prophecy:

> The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone. If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people.

Osborn v. *United States*, 385 U.S. 323, 353-54 (1966) (dissenting opinion).[37]

The right to judicial review is in no way diluted because of the troubled times in which we live and the Army's claim of necessity to deal with civil disorders (Gov't. Brief, pp. 31-33). As Mr. Justice Stewart reminded us last term in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971), speaking of analogous Fourth Amendment rights:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. . . . If times have changed, reducing every-man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

It is against such a background that this Court has developed "sensitive tools," *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967), to guard against even the most "subtle governmental interference" with First Amendment rights. *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960).

Yet in the face of that proud history, the government now suggests that this Court shut its eyes to the assault on free speech and association committed by the Army's domestic surveillance program. It would have the Court

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[37] See also Mr. Justice Brennan's warning about the dangers of electronic surveillance in his dissenting opinion in *Lopez* v. *United States*, 373 U.S. 427, 469-71 (1963).

turn its back on this country's tradition of barring military invasion into civil affairs—a tradition which dates to the complaint in the Declaration of Independence that the King had permitted the military to become "independent and superior to the civil power."

The plaintiffs for their part ask only that they be given their day in court so that they may have an opportunity to prove the Army's unconstitutional course of conduct and the injuries which they and other citizens have suffered as a result of it.[37a]

I.

Plaintiffs' Claims Are Justiciable and Ripe for Adjudication.

A. Plaintiffs' Claims Meet the Requirement of "Immediacy and Reality" and Are Ripe for Adjudication.

The government has persistently attempted to convert this case into something other than the case brought by the plaintiffs. This is not a case in which the plaintiffs challenge a threat of governmental action which could be characterized as hypothetical or speculative; this is not a case in which persons unaffected by governmental action challenge its potential effect on others; nor is this a case in which there is an alternative to present judicial review (Gov't. Brief, pp. 20-22). To the contrary, this case in-

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[37a] It should be noted that the government's present position appears to be inconsistent with that of former Assistant Attorney General (now Mr. Justice) Rehnquist, who was reported to have stated to the Senate Judiciary Committee considering his nomination to this Court, when asked about this problem:

> If it could be shown that the surveillance had a 'chilling effect' on the willingness of people to express dissent then the courts should interfere with the surveillance. *New York Times*, November 5, 1971, p. 22.

volves concrete issues "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968)[38] If the plaintiffs have been prevented from developing the issues "with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests . . . . ", *United States* v. *Fruehauf,* 365 U.S. 146, 157 (1961), it is only because the District Court, at the government's instance, refused to permit it.

The facts to be developed at the hearing which plaintiffs have so far been denied will not merely speculate as to what might occur at some indefinite time in the future; the facts will demonstrate the existence and

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[38] In the court below, the government's challenge to the justiciability of plaintiffs' claims focused not on the question of adversity, but on whether plaintiffs could "demonstrate that the following are judicially identifiable: a right in the plaintiffs, a duty of the defendants, a breach of that duty, and a remedy within the power of the court." (Government's brief in the Court of Appeals at 16). Reviewing the government's argument and plaintiffs' uncontested allegations in light of this Court's pronouncements on the question of justiciability, the court below properly concluded that:

> The Army has both a duty not to exceed its statutory authority and not to infringe First Amendment rights. Appellants [plaintiffs] claim the Army is doing both; their claim is therefore now justiciable. . . .
>
> The "judicial determination" of this alleged breach of duty is attainable by identifying those areas in which the Army's activity goes beyond that reasonably relevant to its statutory mission requirements, assuming, of course, that limitation of the Army's system to the extent found reasonably relevant to its civil disorder mission would not itself represent a significant instrusion into the protected First Amendment area. . . . (App. 141-142, n. 18).

The government appears to have abandoned this aspect of its justiciability argument before this Court.

operation of the Army's overbroad domestic intelligence system and its inhibitory effect on the present exercise of protected rights by plaintiffs and the class they represent. Thus, the federal courts are not merely being "invited to pass upon the constitutional validity of a [policy] which has not yet been applied or threatened to be applied . . . to [plaintiffs] or others in the manner anticipated." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 460 (1945). There is nothing "hypothetical," see *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947), about what the Army (or plaintiffs for that matter) has been doing which would justify waiting until facts present themselves upon which adjudication can then be made. This is not a case where "the mere existence of a statute, regulation or articulated policy" (Gov't. Brief, at 22), is challenged prior to its application or official interpretation, see *Alabama State Federation of Labor* v. *McAdory, supra.*[39] Instead, as Judge Wilkey properly noted for the court below, "the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [plaintiffs] and others similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment rights of free speech . . . ." (App. 139) (emphasis in original). It is the application and present operation of this system which distinguishes it from a case challenging the mere existence of a policy not yet applied.[40] See the dissenting opinion of Mr. Justice Harlan in *Poe* v. *Ullman*, 367 U.S. 497, 527-28 (1961).

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[39] Compare *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

[40] Where, as here, the military policy under attack is actually being applied to the litigants, and the relevant facts can be readily

The government seems to be under the misapprehension that if governmental action infringes the constitutional rights of large numbers of people, as opposed to only one or a few, it somehow loses its justiciability. There is, of course, no such doctrine in our constitutional jurisprudence. Many of the historic constitutional decisions of this Court have in fact come in the context of cases in which a representative party asserted the common injury suffered by vast numbers of citizens. Certainly *Baker* v. *Carr*, 369 U.S. 186 (1962) and its progeny fall in this category, as do many of the racial segregation cases. See particularly *Evers* v. *Dwyer*, 358 U.S. 202 (1958), where this Court reversed the decision of a three-judge district court, which had dismissed the complaint on the ground that no actual controversy existed between an individual black citizen of the City of Memphis on the one hand and the public officials responsible for maintaining a segregated transit system on the other.

The government supports its justiciability argument by labeling plaintiffs' claims as "generalized grievance about the conduct of government" (Gov't. Brief, p. 15), lacking the specificity and particularity necessary to create the concrete adverseness required by the case and controversy limitation on the federal courts. In support of that asser-

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ascertained, this Court can be "confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. at 106.

tion, the government cites the dictum of *Flast* v. *Cohen*, 392 U.S. at 106, a case much nearer to being a "generalized grievance" against government than the instant one,[41] and which this Court, by an 8 to 1 vote, nevertheless found to satisfy the case and controversy requirement.

The government's argument has no merit. Plaintiffs allege that the Army is engaged in an unconstitutional course of conduct which seriously abridges freedom of speech for all Americans, while imposing special burdens upon themselves. Assuming plaintiffs can prove those allegations (and all they ask of this Court is the opportunity to do so), their claim is no more a generalized grievance against the conduct of government than cases which alleged a practice of maintaining a racially segregated transportation system, *Evers* v. *Dwyer, supra;* a practice of discriminating against racial groups in voter registration, *United States* v. *Louisiana*, 380 U.S. 145 (1965); *United States* v. *Mississippi*, 380 U.S. 128 (1965); a practice of investigating the associations of bar applicants, *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154 (1971);[42] a practice of denying equality of voting rights by weighted voting, *Baker* v. *Carr, supra;* a practice of permitting radio broadcasts to the "captive audience" on District of Columbia transit buses, *Public*

[41] In *Flast*, the plaintiffs were challenging a nationwide governmental program which affected them equally with all other citizens. In the instant case, plaintiffs are part of the comparatively narrow group upon which the Army's surveillance system focuses.

[42] In *Wadmond*, the basic thrust of plaintiffs' attack on the bar's character investigation was "that New York's system by its very existence works a chilling effect upon the free exercise of the rights of speech and association of students who must anticipate having to meet its requirements." 401 U.S. at 158-9. Yet none of the three opinions written in that case questioned the justiciability of the claims.

Utilities Commission v. *Pollak,* 343 U.S. 451 (1952); and a practice of stopping and searching long-haired drivers on public highways in violation of the Fourth Amendment, *Lewis* v. *Kugler,* 446 F.2d 1343 (3d Cir. 1971). Yet in none of the above cases have courts had any difficulty adjudicating such "generalized" claims at the instance of one affected by the practice, or in the voter registration cases, the Attorney General on behalf of the affected class.

Indeed, none of the courts which have thus far considered claims similar to the one at bar have expressed any doubt as to their justiciability. While these courts have indicated a variety of views on the merits of a challenge to governmental surveillance of political activities, the challenge in each case was found to present a controversy "of the type which admit of judicial resolution," *Powell* v. *McCormack,* 395 U.S. 486 (1969). See, in addition to the opinion of the court below, *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal argued *sub nom. ACLU* v. *Laird,* 71-1159 (7th Cir. 1972);[43] *Yaffe* v. *Powers,* 40 L.W. 2494 (1st Cir. Jan. 26, 1972), reversing 71-514-J, (D. Mass. June 13, 1971), and remanding for class action determination and discovery proceedings; *Anderson* v. *Sills,* 56 N.J. 210, 265 A.2d 278 (1970), reversing 106 N.J. Super. 545 (Ch. Div. 1969), and remanding for an evidentiary hearing. See also *Aronson* v. *Giarusso,* 436 F.2d 955, 957 (5th Cir. 1971); *Fifth Avenue Peace Parade Committee* v. *Hoover,* 70 Civ. 2646 (S.D.N.Y. February 9, 1972); *Holmes* v. *Church,* 70

[43] *ACLU* v. *Westmoreland* is a limited version of this case. It is currently on appeal following dismissal after an evidentiary hearing for failure to prove any unconstitutional conduct on the part of the Army. Interestingly, the government is not challenging justiciability in that case, but is seeking to uphold the trial court's decision on the merits. In other words, the government is litigating there a claim it says is not justiciable here.

Civ. 5691 (S.D.N.Y. June 14, 1971) (order enjoining police surveillance of political activists "neither suspected of nor engaged in criminal activity"); *Vietnam Veterans Against The War* v. *Nassau County Police Dep't.*, —— F. Supp. —— (E.D.N.Y. 1971); *Avirgan* v. *Rizzo*, 70 Civ. 477 (E.D. Pa. 1970).

Nor is this case substantially different from a number of cases decided by federal courts challenging various police programs said to violate the constitutional rights of a broad class of citizens. The landmark decision in this area is, of course, *Hague* v. *CIO*, 307 U.S. 496 (1939), decided 33 years ago. See also *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir., 1966) (*en banc*); *Lewis* v. *Kugler, supra; Council of Organization on Philadelphia Police Accountability and Responsibility* v. *Tate* (E.D. Pa., Civ. No. 70-2430), discussed in *Lewis* v. *Kugler, supra*, at n. 5. And see Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 Yale L.J. 143 (1968).

All of the foregoing cases, which involved representative plaintiffs who shared a common constitutional injury with a large number of other citizens, were found to be justiciable. Indeed, some of those cases involved rights which do not stand as high in our scheme of constitutional values as the transcendent First Amendment freedoms at stake here; freedoms which are so "delicate and vulnerable," *NAACP* v. *Button*, 371 U.S. 415 (1963), that they require prompt adjudication whenever they are seriously threatened, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

The government seems to have fallen victim to its own assertions that plaintiffs object only to the threat of future injury to the rights of others. That, of course, is not plaintiffs' complaint at all. They complain of existing and continuing present injury to their own First Amendment rights

as well as to others similarly situated. They allege immediate and irreparable injury to rights of speech and association—basic guarantees of our Constitution which are "warrants for the here and now" and which, once abridged, are eternally lost and can never be restored. *Watson* v. *City of Memphis*, 373 U.S. 526, 533 (1963).

Viewed from that perspective, it cannot be seriously argued that plaintiffs' claims lack sufficient focus and concreteness. Indeed, they allege that the government is very concretely intruding upon their private and political lives, and their complaint focuses on the very concrete question whether the Army may collect and keep records of their constitutionally protected political activities. There is nothing abstract about such claims. They carry with them elements of "immediacy and reality" which are the core of the ripeness requirement. *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969), quoting from *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U.S. 270, 273 (1941).

Furthermore, as the court below noted, "because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action" (App. 142), the only alternative to present adjudication is continued abridgment of plaintiffs' rights. This Court has never permitted continued interference with First Amendment rights in the expectation that someone who has suffered even greater injury will come forward, since "a denial of constitutionally protected rights demands judicial protection. . . ." *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). While in a number of cases the Court has deferred a broadside attack on statutes allegedly infringing on First Amendment rights in favor of adjudication of only narrow questions, see, e.g., *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); or, even temporarily

avoided the issues in their entirety, see, e.g., *DuBois Clubs* v. *Clark*, 389 U.S. 309 (1967), each of these cases presented an adjudicative alternative.[44] There, the administrative process offered the possibility of developing an adequate record upon which subsequent constitutional adjudication could be based.

For all these reasons, this case should not be excluded from the very strong presumption in favor of reviewability of governmental actions infringing upon constitutional rights, Jaffe, Judicial Control of Administrative Actions (1965), p. 336, *et seq.*, cf. *Association of Data Processing* v. *Camp*, 397 U.S. 150, 157 (1970).

B. The Present Inhibiting Effect on the Exercise of First Amendment Rights Creates a Justiciable Controversy.

This case is not only presented "in a form historically viewed as capable of resolution through the judicial process," *Flast* v. *Cohen*, 392 U.S. at 95, but it also falls within the special adjudicative principles developed in recent years which enable a litigant to secure early protection for fundamental First Amendment rights without waiting "until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." *National Student Association* v. *Hershey*, 412 F.2d 1103, 1110 (D.C. Cir. 1969).

These special principles stem from the Court's recognition that governmental activity may run afoul of the First

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[44] The same is true of cases such as *Younger* v. *Harris*, 401 U.S. 37 (1971), where "a proceeding was already pending in the state court," which offered the petitioner an opportunity to protect his rights. *Id.* at 49. See also the concurring opinion of Mr. Justice Brennan, pointing out that the petitioner in that case had already submitted his constitutional claims to the state court. *Id.* at 57n.

Amendment not because it is aimed directly at the regulation of free speech, but because in operation it may trigger a set of behavioral consequences which cause people to censor themselves in order to avoid trouble with the government. See, e.g., *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 66 (1971); *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. at 158-59; *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 609 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11, 16-19 (1966); *DeGregory* v. *Attorney General*, 383 U.S. 825, 828-29 (1966); *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-7 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 at 485-88; *Baggett* v. *Bullitt*, 377 U.S. 360, 378-79 (1964); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 544, 556-57 (1963); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); *Talley* v. *California*, 362 U.S. 60, 65 (1960); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958); *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958); *Sweezy* v. *New Hampshire*, 354 U.S. at 248; *Watkins* v. *United States*, 354 U.S. 178, 197-98 (1957).[44a]

These cases all focused upon the present diminution of First Amendment rights. In some of these cases First Amendment rights were chilled by criminal prosecution, *Dombrowski* v. *Pfister, supra*, or the fear of specific prosecution, *Zwickler* v. *Koota, supra*. In others, for example, it was the threat that those who insisted on exercising First

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[44a] See also, *National Students Assoc.* v. *Hershey*, 412 F.2d 1103, 1111-1115 (D.C. Cir. 1969); *Wolff* v. *Selective Service Local Bd. No. 16*, 372 F.2d 817, 823-25 (2nd Cir. 1967); *Reed Enterprises* v. *Corcoran*, 354 F.2d 519, 522, 523 (D.C. Cir. 1965); *Hentoff* v. *Ichord*, 318 F. Supp. 1175, 1181-82 (D.D.C. 1970); *Straut* v. *Calissi*, 293 F. Supp. 1339, 1342-43 (D. N.J. 1968) (three-judge court); *Local 309* v. *Gates*, 75 F. Supp. 620, 624 (N.D. Ind. 1948); *Anderson* v. *Sills*, 56 N.J. 210, 221, 226-27, 265 A.2d 678, 684, 687 (1970).

Amendment rights (by refusing to sign an oath) would be deprived of their jobs, *Elfbrandt* v. *Russell, supra; Baggett* v. *Bullitt, supra,* and *Keyishian* v. *Board of Regents, supra,* or their tax exemption, *Speiser* v. *Randall, supra.* But in many of the cases in which this Court has developed the chilling effect doctrine, the burden upon First Amendment rights consisted of the general anxiety generated among citizens when the government attempted to collect and record the names of persons who were exercising their First Amendment rights in unpopular ways, *Lamont* v. *Postmaster General, supra; Talley* v. *California, supra,* or when the government sought to compel subsequent disclosure of First Amendment activities or associations, *Baird* v. *State Bar of Arizona, supra; DeGregory* v. *Attorney General, supra; NAACP* v. *Alabama, supra; Gibson* v. *Florida Legislative Comm., supra; Sweezy* v. *New Hampshire, supra; Watkins* v. *United States, supra.*[45]

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[45] The court below, while finding plaintiffs' claims justiciable, categorized cases such as *Lamont, Talley, NAACP* v. *Alabama,* and *Sweezy,* as "[c]ases involving some element of government compulsion, either to testify regarding one's political ideas or beliefs, or to identify oneself in order to exercise First Amendment rights" (App. 138, n. 14). Plaintiffs believe this group of cases stands for a more subtle point, with its roots at the core of the First Amendment: that Lamont (and more especially "those who have sensitive positions," 381 U.S. at 307) not be singled out by an ever present government as one desiring to receive Communist political propaganda; that Talley, though acting openly in public, may yet preserve his anonymity from an ever present government; that members of the NAACP, though freely choosing to associate together, may too preserve their anonymity from an ever present government; and that Sweezy and Watkins may preserve the secrecy of their ideas and ideals from the ever present government. It was the chilling effect likely to be caused by the government's gathering of information about First Amendment activities which was the essence of the injury in each of those cases. See generally, Note, The Chilling Effect in Constitutional Law, 69 Colum. L.R. 808 (1969).

"The peculiar feature of suits alleging a First Amendment chilling effect, . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interests if he *does not* speak or act as he says he wants to." *NSA* v. *Hershey, supra,* 412 F.2d at 1111 (emphasis in original). Thus, last term in the *Wadmond* case, the Court entertained on the merits a claim that New York's system for admitting persons to the bar worked a

> "chilling effect" upon the free exercise of the rights of speech and association of students who must anticipate having to meet its requirements. (401 U.S. at 158-59)

Despite the fact that appellants there challenged the mere existence of the system, this Court entertained the suit on the merits, as did the three-judge district court, without questioning its justiciability.[46] Notably, the government has failed even to mention this most recent example of the Court's willingness to entertain suits based on a chilling effect resulting from overbroad governmental programs. Here, the case is much stronger, since plaintiffs allege and are prepared to show that the Army's surveillance system is actually being applied to the detriment of their First Amendment rights.[47]

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[46] The District Court did address the question of "standing" and found the plaintiffs satisfied that requirement. 299 F. Supp. 117, 122-3 (S.D.N.Y. 1969).

[47] The fear expressed by the court in *NSA* v. *Hershey, supra,* that "[o]ne result of adjudicating wherever there is a chill may well be to require resolution of complex questions without the beneficial focus afforded by adversary argument trained upon a concrete factual dispute," 412 F.2d at 1114, is not operative under the circumstances of this case, since constitutional adjudication can be made with "the beneficial focus afforded by adversary argument trained upon a concrete factual dispute." *Id.*

Plaintiffs fear that jobs will be lost or denied as a result of military dissemination of information about their political activities and associations and they are therefore inhibited in the free and full exercise of their First Amendment rights (App. 10). They allege that others less courageous than themselves are deterred from associating with them and joining in common political programs for fear that they too will be ensnared in the military's data collection and dissemination program (App. 10-11).

1. ***This Court has often taken notice of the chilling effect upon free speech and association caused by overbroad governmental activities.***

Taking its cue from the dissent in the court below, the government argues that the plaintiffs' claims derive from "highly visionary apprehensions that are admittedly based on abstractions which cannot be comprehended or are beyond human experience and understanding" (Govt. Brief, p. 28). In stark contrast to this characterization of the complaint, the majority below held that the Army's practice of monitoring civilian politics is a "threat to civil liberties" and "a deterrent on the exercise of the constitutional right of free speech," and that the plaintiffs' claims should therefore be considered on their merits by the District Court (App. 144).

The decision of the court below is in fact consistent with the common knowledge, often expressed by this Court, that certain overbroad governmental activity can result in "a present inhibition of lawful behavior and of First Amendment rights" (App. 139). Indeed, this Court has reached that conclusion in many cases over the past two decades by taking notice of the deterrent effects of a variety of

other governmental programs, some of which were not as alarming as the Army's surveillance program. They have included (a) attempts by state legislatures and other official bodies to compel disclosure of membership in and to obtain membership lists of political organizations; (b) statutes regulating the distribution and exhibition of literary materials on the grounds of obscenity; (c) statutes or regulations requiring persons exercising their rights of free speech in particular ways to identify themselves to government officials; (d) attempts by government employers to extract loyalty oaths from their employees; and (e) prosecution of persons for engaging in activities protected by the First Amendment. On numerous occasions the Court has held that the allegations of chill resulting from such overbroad governmental activities not only satisfied the requirements of justiciability and standing, but also were sufficient to establish unconstitutionality itself.

The issue upon which the Court fixed its attention in each case was the effect which governmental interference with speech and association was likely to have on the willingness of other people to engage in constitutionally protected expression. In each of these cases the constitutional evil was the chill generated by the government in the political marketplace. From that perspective, the claim before the Court that the Army's surveillance system violates First Amendment rights is indistinguishable from other cases in which "this Court recognize[d] that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958).

a. *Compulsory Disclosure of Associations.* The most striking examples of the Court's acknowledgment that governmental activity can chill the exercise of First Amendment rights are cases where the government has attempted to compel disclosure of membership in controversial political organizations or to compile lists of the members of such groups.

In *Shelton* v. *Tucker,* 364 U.S. 479, 486 (1960), the Court struck down a state statute that required teachers to file affidavits listing their organizational memberships. Writing for the majority, Mr. Justice Stewart characterized the constitutional harm as a chilling effect on the associational freedom of teachers caused by their fear of public exposure:

> The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless. Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy.

A similar governmental deterrence of freedom of association was the basis for Mr. Justice Black's dissent in *Konigsberg* v. *State Bar,* 366 U.S. 36, 73-74 (1961), a case involving the power of a state bar committee to question applicants on their membership in controversial organizations:

> If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission into the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid association with any organization that advocates anything at all somebody might

> possibly be against, including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment.

While the majority in *Konigsberg* did not take issue with the dissent's characterization of chilling effect, it decided that in that instance the impact on First Amendment rights had to give way to the state interest in regulating admissions to the bar.[47a] Indeed, the view expressed in the *Konigsberg* dissent, became the view of the Court last term in *Baird* v. *State Bar of Arizona,* 401 U.S. 1, 6 (1971), where Mr. Justice Black, now writing for the majority, asserted that inquiries into political associations by bar committees would "discourage citizens from exercising rights protected by the Constitution."

This Court has been even more rigorous in protecting associational freedom from the chill of governmental activity when membership lists of controversial organizations have been subjected to the threat of public exposure by the government. Mr. Justice Harlan spoke for a unanimous court, for example, in reversing a contempt conviction for failure to produce organizational membership lists in *NAACP* v. *Alabama,* 357 U.S. 449, 460-61 (1958):

> [I]t is immaterial whether the beliefs sought to be advanced by the association pertain to political, economic, religious or cultural matters; . . . state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Facing the same issue in *Bates* v. *City of Little Rock,* 361 U.S. 516, 523 (1960), a unanimous Court again held that

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[47a] This case, of course, has not yet progressed to the point where such a consideration of the merits is appropriate.

the disclosure of membership lists of organizations engaged in disseminating ideas and airing public grievances may not be compelled:

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.

See also *Louisiana* v. *NAACP,* 366 U.S. 293, 297 (1961) ("regulatory measures . . . , no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights").

In all these cases the Court found that the government's demand for information about political association and membership in unpopular groups would chill such association. The finding was based upon an observation that the government's influence on political controversy is often greater than would appear on the face of a particular governmental regulation, and that the exposure of unpopular persons or groups would often serve to increase their unpopularity and deter others from joining or associating with them. Cf. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250-51 (1957). There is no reason to suspect the chill is any less real when people see the armed forces gathering this information. It is a palpable warning that government authority considers such organizations and individuals suspect. In *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539, 556-57 (1963), the Court explained in detail the principle it had applied in earlier membership disclosure cases:

> While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of

> persons espousing beliefs already unpopular with their neighbors and *the deterrent and "chilling" effect* on the free exercise of constitutionally enshrined rights of free speech, expression, and association *is consequently the more immediate and substantial.* (Emphasis added.)

b. *The Censorship Cases.* In cases involving censorship, obscenity, and libel laws, the Court has also recognized the deterrent or chilling effect such laws and programs have on freedom of expression and on the public's access to political and literary ideas protected by the First Amendment.

In *Smith* v. *California,* 361 U.S. 147 (1959), the Court held unconstitutional an obscenity statute which imposed strict liability on booksellers. Observing that the bookseller's "timidity in the face of his absolute criminal liability . . . would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly," 361 U.S. at 154, the Court took notice that such a deterrent on booksellers operated as an inhibition on the exercise of First Amendment rights by the entire reading public. Four years later, in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 71 (1963), holding a state commission's informal censorship practices to be "radically deficient," the Court warned:

> It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. [372 U.S. at 66.]

Such "barely visible encroachments" have also been found by the Court to result from the operation of state libel laws. Speaking for the majority in *New York Times* v.

Sullivan, 376 U.S. 254, 278 (1964), which relieved a newspaper from liability for its criticism of public officials, Mr. Justice Brennan touched upon the underlying constitutional infirmity:

> [T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

In all the censorship cases the anticipated chill on First Amendment rights compelled the Court to hold that judicial protection must be available at the earliest point at which the exercise of constitutional rights might be deterred. For example, in holding a state motion picture censorship statute invalid as a prior restraint on freedom of expression in *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965), the Court warned of the dangers of inadequate procedural safeguards for reviewing the censor's determination, since "it may take very little to deter exhibition."

c. *Self-Identification and Registration Requirements.* The Court struck down another kind of prior restraint in *Talley* v. *California*, 362 U.S. 60 (1960), where an ordinance requiring the author of a political handbill to identify himself was held to be invalid on its face. Speaking of the deterrent effect of the ordinance, Mr. Justice Black observed:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. . . . [T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified . . . .

> [I]dentification and fear of reprisal might deter perfectly peaceful discussion of public matters of importance. [362 U.S. at 64-65.]

A challenge to a similar statute prohibiting the distribution of anonymous political handbills was held to be justiciable in the face of abstention arguments in *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967), where the Court noted that

> . . . to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.

The evil of compulsory self identification was also considered by the Court in the review of a federal statute placing an affirmative obligation on a person to express a desire to receive in the mail what had been determined by postal authorities to be "communist propaganda," *Heilberg* v. *Fixa*, 236 F. Supp. 405 (N.D. Cal. 1964), *aff'd sub nom. Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The lower court in *Heilberg* had observed that the claim that the government could not compile political lists of names was neither abstract nor visionary:

> Similar lists under earlier non-statutory screening programs were routinely turned over to the House Committee on Un-American Activities . . . . There are no . . . assurances that this information will not be made available in the future . . . .
>
> Moreover, the practices . . . cannot help but deter the free expression of ideas. [236 F. Supp. at 409.]

Affirming the lower court in the same spirit, this Court took note of the chilling effect on First Amendment rights that the regulation's affirmative obligation was likely to cause:

> This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. . . . Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." [381 U.S. at 307.]

Mr. Justice Brennan's concurrence reminded that "inhibition as well as prohibition against the exercise of First Amendment rights is a power denied to government." *Id.* at 309.

These cases are conceptually indistinguishable from the case at bar. None of the regulatory schemes included especially onerous requirements and, moreover, they dealt with activities that were in no way private or secret. The essential vice was that persons who wanted to exercise First Amendment rights had to register their names with a government agency. This Court correctly perceived that many persons other than the individual complainants, particularly those in sensitive positions, might be deterred from doing what they had every right to do.

(d) *Loyalty Oaths.* This Court has also taken notice of the chilling effect of free speech when loyalty oaths are administered to teachers and other public employees. The constitutional defect in a loyalty oath is not only its impact on those whose sensibility forbids them from subscribing to sometimes vague and far-reaching statements, but its ultimate effect on free political expression—the chill or inhibition placed upon the exercise of First Amendment rights by all members of the affected community. See generally Askin, *Loyalty Oaths in Retrospect: Freedom and Reality,* 1968 Wisc. L. Rev. 465.

In *Weiman* v. *Updegraff*, 344 U.S. 183 (1952), the Court held that a loyalty oath for state employees violated their rights of free association and due process. Mr. Justice Black, in his concurring opinion, described the broad danger to society from such laws:

> Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. [344 U.S. at 193.]

Also concurring, Mr. Justice Frankfurter warned that:

> Such unwarranted inhibition upon the free spirit of teachers affects not only those who . . . are immediately before the Court. It has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. [344 U.S. at 195.]

Similarly, in *Speiser* v. *Randall*, 357 U.S. 513 (1958), the Court held that denial of state tax exemption for refusing to take a loyalty oath violated the First Amendment.

> The man who knows that he must bring forth the proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. [357 U.S. at 526.]

Three years later, the Court struck down a loyalty oath for school teachers on vagueness grounds in *Cramp* v. *Board of Instruction*, 368 U.S. 278, 287 (1961), again noting the chill caused by such regulation:

> The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.

In *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) the Court reflected upon its earlier decisions and further identified the nature of the First Amendment inhibition resulting from a loyalty oath program. Speaking for the majority, Mr. Justice White explained:

> Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited. (377 U.S. at 372.)

Finally, in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 607 (1967), the Court struck down another state loyalty oath for teachers as vague and overbroad, stressing that:

> [*T*]*he stifling effect* on the academic mind from curtailing freedom of association in such a manner *is manifest, and has been documented in recent studies.* [385 U.S. at 607 (emphasis added).]

(e) *Penal Statutes.* The chilling effect doctrine has been utilized not only to strike down substantive legal pro-

visions, but also to expedite the point at which a controversy becomes ripe for adjudication. See generally, Comment, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969). The Court has permitted a departure from the normal rules of non-interference with state criminal prosecutions in situations where "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of . . . prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965).

The Court in *Dombrowski* was expanding on ideas earlier articulated in Mr. Justice Brennan's opinion in *NAACP* v. *Button*, 371 U.S. 415 (1963):

> [T]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. [371 U.S. at 432-433.]

The chilling effects resulting from the government regulations and programs in most of the foregoing cases were no less imaginary, speculative, visionary, abstract or indefinite than plaintiffs' allegations in this case. Indeed, since this case involves conduct not by civilian agencies of government, but by the United States Army, Judge Wilkey correctly noted that it presented a much more serious "deterrent on the exercise of the constitutional right of free speech" than the typical First Amendment case (App. 145).

Indeed, lower federal courts have noted in several cases that mere physical surveillance of protected activity by

agents of some controlling authority—i.e., mere watching unrelated to an ongoing program of data collection and recordation as we have here—is itself chilling enough to warrant judicial intervention. See *Furniture Workers Local 309* v. *Gates*, 75 F. Supp. 620 (N.D. Ind. 1948); *Bee See Books* v. *Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968); *cf. United States* v. *McLeod*, 385 F.2d 734, 750 (5th Cir. 1967). See also *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

The chilling effect of surveillance has been acknowledged even by the current Administration. Testifying before the Constitutional Rights Subcommittee's inquiry into government data banks, in his capacity as Assistant Attorney General, Mr. Justice Rehnquist had the following dialogue with Senator Ervin (Ervin Hearings Part I, pp. 621-622):

> Senator Ervin: Don't you think—most people are sort of afraid of government surveillance . . . ?
>
> Mr. Rehnquist: I do not doubt a number are, Mr. Chairman. . . .
>
> Senator Ervin: Very well. You have no opinion of whether it does exercise an intimidating influence on people for them to be even under the surveillance of the federal law enforcement officials, or to suspect that they are?
>
> Mr. Rehnquist: I do not doubt that is the case with many people. But I do not think you can lay it down as a general principle.

Of course, plaintiffs do not suggest that every single person in the country is chilled, nor that all those who are chilled labor under the same degree of apprehension or intimidation. But the First Amendment is not reserved for heroes. When "many people" are chilled, a justiciable

controversy exists, so long as the other requirements of the justiciability doctrine are satisfied.

2. *Social science data supports the Court's recognition of the chilling effect of overbroad governmental programs.*

This Court's assumptions in the foregoing cases are consistent with the common knowledge and understanding of the general public, for "a court must be blind not to see," as Chief Justice Taft taught us in a famous opinion, what "all others can see and understand. . . ." *Bailey* v. *Drexel Furniture Co.*; 259 U.S. 20, 37 (1922). In addition, these judicial assumptions are supported by a vast body of social science data and literature, the general thrust of which we set out in some detail in the Appendix[47b] to this brief.

[47b] Courts, of course, can take notice of social science facts and have done so on many occasions. As Judge Learned Hand pointed out over sixty years ago in *Parke-Davis & Co.* v. *H. K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D. N.Y. 1911), courts have a duty to provide themselves with the best information and expert opinion available on technical subjects:

> How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.

This Court has frequently looked to social science data even when deciding the *merits* of constitutional questions, and even when the data was not included in the record made below. *Powell* v. *Texas*, 392 U.S. 514 (1968).

Robinson v. *California*, 370 U.S. 660 (1962) cites six social science and medical articles for the proposition that narcotic addiction can be contracted "innocently" and is not always contracted in a criminal manner, *Id.* at 667, n. 9, and in his concurring opinion Mr. Justice Douglas quotes extensively from articles and studies done in the area of narcotics addiction, *Id.* at 670-71.

Similarly, in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), not only was there expert social science testimony on the record

The Appendix demonstrates that the occurrence of chill is a recognized and normal response to certain kinds of social situations which people have learned to categorize as threatening. Such a response is known as avoidance behavior, and can be learned either directly, as a result of a person's own past experience, or vicariously. Avoidance behavior has been found to be of long duration since it is more difficult to extinguish than other forms of learned behavior.

Among the social-psychological factors which generate the response of chill to the kind of military surveillance challenged in the instant case are: the power or authority of the surveillance agent to implement sanctions; the anxiety which occurs when a subject's behavior is being evaluated; the removal of anonymity; and the uncertainty or ambiguity of the situation.

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but a separate statement by 32 social scientists was submitted to the Court as an appendix to appellants' briefs. The Court cited several studies from the material, and noted that the negative effects of segregated facilities on black children had been shown experimentally. *Id.* at 494, n. 11.

Finally, in *Muller* v. *Oregon*, 208 U.S. 412, 419 (1908), a suit challenging the constitutionality of an Oregon statute which limited the employment hours of women, the Court said:

> It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources.

The court then cited in a footnote part of the brief filed for the defendant by Louis D. Brandeis. *Id.* at 419, n. 1:

> In light of the large number of cases in which this and other federal courts have noticed social science facts in deciding the merits of constitutional issues, it is certainly appropriate to consider such material for the relatively narrow purpose of determining that a controversy is justiciable—whether or not the Court agrees with the Court of Appeals that plaintiffs ultimately will have to offer evidence of "inhibiting effect" in order to prevail on the merits (App. 148, para. 3 of remand instructions).

Another important finding is that political behavior which was formerly considered legitimate becomes stigmatized and redefined as illegitimate as a result of such government surveillance.

Thus when a person feels he might be the subject of surveillance by a powerful military authority and thus be stripped of his behavioral anonymity, he would be expected to experience anxiety about possible consequences and to become more apprehensive about engaging in activities which he feels would be disapproved. Furthermore, the very uncertainty of the existence of such surveillance and its potential consequences would only heighten that anxiety.

The subject himself may even redefine his own views as a result of the stigma he feels is attached to those views by the government's apparent disapproval of them.

This chill process is reinforced by knowledge that in the past specific negative consequences were visited upon persons who became subject to such government investigation and surveillance.

These principles were illuminated by several studies of the effects of government surveillance and investigation in the United States during the 1950s. The studies found the following specific inhibiting effects on government employees: they stopped subscribing to certain periodicals, they avoided discussing politics in public, they did not join legitimate political organizations, and they were stigmatized if investigated. The subjects of these investigations reported that they suffered loss of health and tarnished reputations, and there was no relief from these "sanctions" even if they were cleared.

The fundamental conclusion of these studies was that the subjects were chilled because they responded to the situation as defined by the prevalent atmosphere or climate of thought. In responding to this global situation, people began to fear that they must adhere to more specific and concrete codes of behavior than those which they had traditionally observed. After this occurred, people often internalized the newly accepted standard or code. As one of these studies concluded:

> (T)he hazards of being investigated—even if one is subsequently cleared—are so great that individuals are induced to limit their behavior by avoiding (or trying to avoid) anything that might conceivably arouse anyone's suspicion and thus lead to charges and an investigation. (Jahoda and Cook, *Security Measures and Freedom of Thought,* 61 Yale L.J. 296, 318 (1952).)

3. Plaintiffs are, at a minimum, entitled to a hearing on the existence of chilling effect, since the Court may not judicially notice the absence of chill at this stage of the proceedings.

Plaintiffs contend that, as to the threshold question of justiciability, this Court must take as true plaintiffs' factual allegations of chilling effect caused by the Army's conduct.[47c] However, even if the Court is unwilling to assume the validity of plaintiffs' allegations relating to chill, the

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[47c] Plaintiffs further contend that after an evidentiary hearing detailing the scope of the Army's intrusion into First Amendment activities, it would be consistent with prior decisions of this Court for the trial court, based upon inferences drawn from the proof, to conclude that the Army's intelligence-gathering program generates a constitutionally forbidden chilling effect.

Court may not take judicial notice that there is *no* chill—particularly in the face of the evidence to the contrary cited in the Appendix.

Yet, for the Court to accept the government's argument that the present claim is not justiciable, it would have to take just such notice, that is, it would have to conclude, either implicitly or explicitly, that under no set of circumstances could the Army's widespread political intelligence gathering operation cause a significant chill on the ability of plaintiffs and their class to exercise First Amendment rights. Consequenly, if the Court declines to accept plaintiffs' allegations of chilling effect, the only proper procedure is to remand the case to the trial court for proof on that issue, as well as on the scope of Army surveillance.

In *Law Students Civil Rights Research Council* v. *Wadmond, supra,* 401 U.S. at 167, the Court, in an opinion by Mr. Justice Stewart, concluded:

> We are not persuaded that careful administration of such a system as New York's *need result* in chilling effects upon the exercise of constitutional freedoms (emphasis added).

But that conclusion was based upon a full evidentiary hearing in which plaintiffs had the opportunity to present whatever evidence they desired, including evidence of chill. The plaintiffs here insist that, at the very least, they are entitled to the same opportunity.

C. Plaintiffs Assert Justiciable Claims of Invasion of Privacy.

In addition to the claims of invasion of their First Amendment rights of speech, association and assembly, plaintiffs also seek relief from defendants' invasion of their privacy (App. 11). The plaintiffs seek, inter alia, a judicial order prohibiting the Army from surveilling and monitoring their personal activities and disseminating information about them and requiring the destruction of whatever files and dossiers the Army presently maintain. However plaintiffs' right of privacy (and defendants' duty not to invade it) might ultimately be defined, there can be little argument over the justiciability of such claims, which is the only question presently before this Court. Certainly plaintiffs have a right to hearing and judicial determination as to whether their right of privacy has in fact been unnecessarily invaded by Army surveillance. See generally Miller, *The Assault on Privacy* (1971); Note, *Police Undercover Agents: New Threat to First Amendment Freedoms,* 37 Geo. Wash. L. Rev. 634 (1969); Beaney, *The Right to Privacy and American Law,* 31 Law and Contemporary Problems 253 (1966); Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's, Part II—Balancing the Conflicting Demands of Privacy, Disclosure and Surveillance,* 66 Colum. L. Rev. 1205 (1966).

Just last term Mr. Justice Stewart wrote:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. [*Coolidge* v. *New Hampshire,* 403 U.S. at 453, quoting *Wolf* v. *Colorado,* 338 U.S. 25, 27 (1949).]

This case, no less than *Coolidge*, raises questions concerning the permissible scope of police intrusion into the right of privacy.

The "right to be let alone" was called by Mr. Justice Brandeis "the most comprehensive of rights and the right most valued by civilized men," *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). It has more recently been described by a member of this Court as "the beginning of all freedom." *Public Utilities Commission* v. *Pollak*, 343 U.S. at 467 (Douglas, J., dissenting).

While the right to privacy covers a multitude of situations, compare *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), with *Public Utilities Commission* v. *Pollak*, *supra*, cf. *Katz* v. *United States*, 389 U.S. 347 (1967), our courts have, at least in recent years, generally recognized that public or private spying upon an individual's activities gives rise to a justiciable claim for judicial protection which requires a full hearing on the facts before a decision can be reached on the merits of the plaintiff's petition for redress. Cf. *York* v. *Story*, 324 F.2d 450 (6th Cir., 1963), cert. denied, 376 U.S. 939 (1964).

Giancana v. *Johnson*, 335 F.2d 366 (7th Cir., 1964), involved a suit to enjoin the Federal Bureau of Investigation from overt surveillance of an alleged underworld leader. While the 2-1 majority of the Court of Appeals dissolved the lower court's injunction on the ground that the complaint had failed to satisfy the $10,000 amount in controversy requirement of 28 U.S.C. 1331, the court considered the question of an unwarranted invasion of plaintiff's privacy justiciable:

> Courts may not treat as a mere technicality the jurisdictional amount essential to the "federal question" jurisdiction, even in this case where there is an allegedly unwarranted invasion of plaintiff's privacy. 335 F.2d at 368.

In dissent, Judge Swygert indicated that the question of the right of privacy is justiciable under the Fourth and Fifth Amendments, citing the conclusion of the lower court:

> That the rights under the Fourth and Fifth Amendments to which the plaintiff is entitled as a citizen of the United States and a person within the jurisdiction of the United States are: (1) The right to be free from arbitrary intrusion into his privacy by agents of the Federal Government, without due process of the law; (2) The right to be free from deprivation of his liberty and freedom by agents of the Federal Bureau of Investigation without due process of law; and (3) the right to be let alone by agents of the Federal Bureau of Investigation unless there be reasonable grounds to justify interference of plaintiff's liberty and freedom by said agents. [335 F.2d at 371.]

The right of privacy with which *Giancana* was concerned has also been recognized as a common law right which gives rise to an action by one private individual against another. See 14 A.L.R.2d 750 and 13 A.L.R.3d 1025. See also *Nader* v. *General Motors Corp.*, 24 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970). Cf. *Afro-American Publishing Co.* v. *Jaffee*, 366 F.2d 649, 653 (D.C. Cir. 1966). Such common law rights would of course also be justiciable as against public agencies, notwithstanding the special defenses the latter might assert. Those defenses do not involve the question of justiciability now before this Court.

The arrest record expungement cases also support plaintiffs' contention that their privacy claims are justiciable. These cases recognize that police must justify by some important public need the retention and/or distribution of information on persons who were arrested but not convicted of crimes. In *Morrow* v. *District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969), the court commented that it was an "unjustified invasion of privacy" for police to disseminate information about innocent persons who had been arrested. In *United States* v. *Kalish*, 271 F. Supp. 968, 970 (D.P.R. 1967), the court asserted:

> [W]hen an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest, fingerprints and a rogue's gallery photograph. . . . *The preservation of these records constitutes an unwarranted attack upon his character and reputation and violates his right of privacy;* it violates his dignity as a human being. (Emphasis supplied.)

The unjustified threat to the individual and the inherent dangers to the right of privacy caused when police retain records of innocent persons was again noted by the District of Columbia Circuit in the recent case of *Menard* v. *Mitchell*, 430 F.2d 486, 490-91 (1970). In the opinion and order of the district court on remand, 328 F. Supp. 718 (D.D.C. 1971), moreover, the court observed:

> The increasing complexity of our society and technological advances which facilitate massive accumulation

and ready regurgitation of far-flung data have presented more problems in this area, certainly problems not contemplated by the framers of the Constitution. These developments emphasize a pressing need to preserve and to redefine aspects of the right of privacy to insure the basic freedoms guaranteed by this democracy. (328 F. Supp. at 725. See footnote 4 of the opinion for a catalog of the inherent dangers of personal data systems.)

See also, *Wheeler* v. *Goodman*, 306 F. Supp. 58, 66 (W.D. N.C. 1969); *Kowall* v. *United States*, 9 Cr. L. Rep. 2482, 2483 (W.D. Mich., 1971); Comment, *Constitutional Law—Maintenance and Dissemination of Records of Arrest Versus the Right to Privacy*, 17 Wayne St. L. Rev. 995 (1971).

As suggested earlier, the right of privacy has many faces and has never been clearly defined by our courts. But as the foregoing cases demonstrate it certainly reaches as far as governmental gathering and recording of information about an individual's words and activities both in private and public. The Fourth Amendment "protects people, not places." *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

If justiciable claims are created by the foregoing invasions of the more ubiquitous right to privacy involved in those cases, how much more compelling are plaintiffs' claims, involving as they do the much more specific right of privacy and anonymity of political action and the "vital relationship between freedom to associate and privacy in one's association" firmly grounded in the First Amendment. *NAACP* v. *Alabama*, 359 U.S. 449, 462 (1958). See also *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960).

In any case, the circumstances under which "the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Coolidge* v. *New Hampshire*, 403 U.S. at 453.

II.

The Justiciability of Plaintiffs' Claims Is Enhanced Because the Military Has Exceeded Its Constitutional and Statutory Authority and Intruded Into Civilian Affairs.

A. This Court should not "stay its hand" and avoid deciding that plaintiffs' ultra vires claims are justiciable.

The government in its brief makes the beguiling argument that even if the plaintiffs can establish their allegations of constitutional injury, the military activity about which they complain has been authorized by statute and in any case is not amenable to judicial review. (Gov't. Brief, pp. 29-33.) Thus while conceding that the court below may have been correct in finding that "there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action" (*Id.*, at 30; App. 142), the government attempts to escape Judge Wilkey's conclusion that "the issue can be considered justiciable at this time" (App. 142) by retreating to an argument which it hopes is beyond judicial scrutiny:

> The Army is not a mere interloper in the civil disturbance field. Its mission there is specifically authorized by statute . . . . [T]hat is perhaps sufficient reason for the judicial branch to stay its hand, for it means that judicial intervention is in fact not necessary to protect those on whose behalf these respon-

dents have purported to sue. The challenged activity of the Executive Branch has already been reviewed.[48]

This argument is extraordinary. In translation, it appears to mean that merely by citing a statute to show that Congress has "authorized" governmental activity which is alleged to have an injurious effect on the constitutional rights of citizens, the government can foreclose judicial review of the challenged activity. Quite apart from the fact that the statutes it relies upon plainly do not authorize the challenged activity, as discussed below, the government's claim that this case is not justiciable because Congress has preempted the issue flies in the face of one hundred and seventy years of judicial review of legislative as well as executive action, when such action is challenged on constitutional grounds. As Chief Justice Marshall wrote in answer to an argument similar to the one urged by the government upon this Court, "[t]hose who controvert the principle, that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes to the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. . . . It would declare, that if the legislature shall do that which is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual." *Marbury* v. *Madison,* 1 Cranch 137, 2 L. Ed. 60 (1803).

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[48] Gov't. Brief, pp. 30, 34. The government is referring to the Ervin Hearings. Both the government and the plaintiffs urge the Court to take judicial notice of the Hearings, although for different reasons.

B. The statutes cited by the government do not authorize political surveillance by the Army.

The statutes cited by the government do not authorize Army surveillance of domestic politics, and therefore are not responsive to the plaintiffs' allegation that the Army has acted "without any lawful statutory authority" (App. 11).

10 U.S.C. sections 331-334 provide for the domestic use of the armed forces by the President "to enforce the laws of the United States" [49] or "suppress insurrection" [50] when it becomes impossible for local and state authorities to enforce the laws "by the ordinary course of judicial proceedings." [51] See *Alabama* v. *United States,* 373 U.S. 545 (1963); *Presser* v. *Illinois,* 116 U.S. 252 (1886); *In Re Charge to the Grand Jury,* 62 F. 828 (D. Ill. 1894). Since the statutes empower the military to act only after a particular insurrection has grown beyond the capabilities of the civilian police,[52] or when the civilian police have refused to enforce the federal laws, *Alabama* v. *United States, supra,* it is extraordinary that the government should characterize the Army's domestic intelligence requirements as "similar to those . . . for local police surveillance in similar situations" (Gov't. Brief, p. 32).

The statutes contain no express or implied reference to the Army's authority to investigate the lawful political

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[49] 10 U.S.C., §332.

[50] 10 U.S.C., §333.

[51] 10 U.S.C., §332.

[52] Indeed, no troops or militia can be employed by the President under this chapter unless and until "he shall by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time." 10 U.S.C., §334.

activity of civilians and to collect, maintain and distribute reports on the First Amendment activities of plaintiffs and their class.[53] Indeed, since protection of the political freedom of citizens and organizations forms the very essence of constitutional liberty and security, *Bates*

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[53] The government suggests in its brief, at p. 32, that even if no express authority can be found in the statutes for the Army's surveillance activities, the Army acted pursuant to the recommendations of the President's National Advisory Commission on Civil Disorders.

This contention is no more supportable than the statutory claim. First, as the court below correctly recognized, the Commission's report recommended improvements in police—not military—intelligence:

> "Intelligence—The absence of accurate information both before and during a disorder has created special control problems for the police. Police departments must develop means to obtain adequate intelligence for planning purposes, as well as on-the-scene information for use in police operations during a disorder" (App. 137).

Nor was the Commission equivocal about this recommendation. In Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, for example, the Chairman of the Commission, Judge Kerner, clearly distinguished the Commission's recommendations from the subsequent actions of the Army in the following colloquy with Senator Kennedy:

> "Senator KENNEDY. In the work of another subcommittee of this Judiciary Committee, Senator Ervin's Constitutional Rights Subcommittee, we have been looking into surveillance of individuals by various governmental agencies. There are public officials attending public meetings being surveilled by the U.S. Army . . . . We have had the observation during the course of responses by varying individuals that this is almost following in the spirit of the Kerner Commission . . . .
>
> I am just wondering what kind of comments you would like to make about this, if any.
>
> Judge KERNER. I would like to say we had relationships with the service, Defense Department, but solely and only in the area of proper training. *We certainly did not suggest in any wise, directly or indirectly, the matter in which Senator Ervin is presently checking and investigating.*" *Id.*, at 22-23 (proceedings of May 25, 1971) (emphasis supplied).

v. *City of Little Rock, supra; NAACP* v. *Alabama, supra,* it is difficult to imagine a construction that would do more violence to the statutory language than the one urged by the government. That the Executive has statutory as well as constitutional authority to combat *illegal overt acts* amounting to "insurrection" [54] *after* the failure of civilian authority, does not mean that the Army can spontaneously[55] institute a sweeping domestic intelligence operation which, the evidence will show on remand, has become "a dragnet which may enmesh anyone." *Herndon* v. *Lowry,* 301 U.S. 242, 263 (1937).

If there were any doubt about the meaning of the statutes, it would be resolved by the decision of this Court in *Schneider* v. *Smith,* 390 U.S. 17 (1968); which dealt with a statute by which Congress had authorized the President to safeguard vessels against sabotage and other subversive conduct. Purporting to act under that authority the President promulgated regulations authorizing the Coast Guard Commandant to gather information about the political beliefs and associations of civilian seamen. The Court held that the statute did not contemplate such broad investigations:

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[54] Cases arising under 10 U.S.C., §333 construe insurrection as "a rising against civil or political authority—the open and active opposition of a number of persons to the execution of law in a city or state." *In re Charge to the Grand Jury, supra,* at 830. See also *Presser* v. *Illinois, supra.*

[55] The government attempts to convey the impression in its brief, at p. 30 n. 25, that Army surveillance was the creation of several Executive Orders. The three 1968 Orders cited, however, involved the callup of federal troops and have nothing whatever to do with Army intelligence. Furthermore, the evidence presented by the Army to the Senate Subcommittee on Constitutional Rights overwhelmingly supports the conclusion that the Army acted on its own in developing a domestic political surveillance program. (See n. 21, *supra.*)

> The present case involves investigation, not by Congress but by the Executive Branch, stemming from congressional delegation. When we read the delegation with an eye to First Amendment problems, we hesitate to conclude that Congress told the Executive to ferret out ideological strays in the maritime industry. The words it used—"to safeguard . . . from sabotage or other subversive acts"—refer to actions, not to ideas or beliefs. We would have to stretch those words beyond their normal meaning to give them the meaning the Solicitor General urges. *Rumely* and its allied cases teach just the opposite—that statutory words are to be read narrowly so as to avoid questions concerning the "associational freedom" that *Shelton* v. *Tucker* protected and concerning other rights within the purview of the First Amendment. 390 U.S. at 26-27.

See also *Cole* v. *Young,* 351 U.S. 536 (1955) (Executive Order aimed at "insuring the 'unswerving loyalty' of all [government] employees" held to exceed authority delegated to executive by statute relating to national security).

C. Any military action relating to civilians is subject to judicial review.

While the plaintiffs are not now asking this Court to resolve the merits of the Army's claim of authority to engage in the activities complained of, there can be little doubt that the question is justiciable. Since the Constitution expressly assigns the power to Congress to define the role of the military in domestic affairs,[56] the military is strictly limited to the domestic role defined by statute, and the courts are charged with the duty to review any exercise by the military of that statutory authority. *O'Callahan* v. *Parker,* 395 U.S. 258 (1969); *Toth* v. *Quarles,* 350 U.S. 11

[56] U.S. Constitution, art. I, §8, cl. 14, 15, 16; art. IV, §4.

(1955); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946); *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). While the Army necessarily has some discretion in performing its statutory duties, this Court has long adhered to the principle that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, *are judicial questions.*" *Sterling* v. *Constantin*, 287 U.S. at 401 (emphasis supplied). Furthermore, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers," *Harmon* v. *Brucker*, 355 U.S. 579, 581-82 (1958) (per curiam), particularly when the injured party is a civilian and the source of his injury is the military, cf. *Sterling* v. *Constantin, supra.*

Two factors demonstrate the quality of plaintiffs' claim that the Army is acting beyond the scope of its authority in conducting a nationwide investigation into the political affairs of the plaintiffs and their class. First, this Court has repeatedly held that any grant of statutory power to the military to act in the civilian arena must be narrowly construed.

> It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires. *Raymond* v. *Thomas*, 91 U.S. 712, 716 (1875).

Military performance of a function of government, therefore, even when expressly authorized by statute, cannot be constitutionally justified unless "[t]he necessity [is] actual and present, . . . *such as effectively closes the courts*

and deposes the civil administration." *Ex Parte Milligan*, 71 U.S. at 127 (emphasis supplied).

When the military acts beyond its statutory authority, on the other hand, no showing of necessity can overcome the unconstitutional usurpation. In *Duncan v. Kahanamoku*, 327 U.S., at 324-25, 329 (Murphy, J. concurring), for example,

> [t]he Court's opinion . . . makes clear that the military trials in these cases were unjustified by the martial law provisions of the Hawaiian Organic Act. . . . Indeed, the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation
>
> . . . . The argument [of necessity] thus advanced is . . . a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war.

The government has often argued that the statutory authority of the Army to engage in activities which impinge upon civilian life should be broadly and "reasonably" construed in times of stress to fit military "necessity"[57] but the argument has been consistently rejected by this Court.

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[57] It should be noted that the scope of the intelligence system challenged by the plaintiffs is far greater even than that required by the government's own definition of "reasonable necessity"—i.e., the necessity of "ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act" (Gov't. Brief, pp. 6, 32; App. 70). While the plaintiffs do not concede the "necessity" as defined by the government, even if they did, the government could not possibly show that it is "necessary" within the terms of its definition to collect and disseminate the kind of information contained in Exhibit A to the Complaint (App. 13-21) and in similar exhibits set forth in the Ervin Hearings at, e.g., Part I, pp. 155, 239-42.

> Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in the light of the 'uniqueness' of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military. We should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition we believe is firmly embodied in the Constitution. *Reid* v. *Covert*, 354 U.S. 1, 40 (1957).

See also *O'Callahan* v. *Parker*, 395 U.S. at 262; *Toth* v. *Quarles*, 350 U.S. at 17; *Sterling* v. *Constantin*, 287 U.S. at 400-01; *Ex Parte Milligan*, 71 U.S. (4 Wall.) at 126; *Ex Parte Merryman*, 17 F. Cas. 144 (No. 9487) (C.C.D.Md. 1861). See generally Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962).[58]

The plaintiffs' ultra vires claim also enhances the justiciability of the issues in this case because Congress, as well as this Court, has repeatedly expressed an extremely narrow view of the scope of permissible military involve-

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[58] Nor can the talismanic claims of "national defense" be invoked by the government to validate military action which invades constitutional rights, since "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the nation worthwhile." *United States* v. *Robel*, 389 U.S. 258, 264 (1967). See also *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398, 426 (1934) ("Even the war power does not remove constitutional limitations safeguarding essential liberties."); *Ex Parte Milligan*, 71 U.S. (4 Wall.), 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government."); *United States* v. *United States District Court*, 444 F.2d 651, 654 (6th Cir.), *cert. granted*, 39 U.S.L.W. 3556 (June 21, 1971) ("It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of the land.").

ment in civilian affairs. Against a background of violence and civil disorder during the Reconstruction period, for example, the Posse Comitatus Act, 18 U.S.C., section 1385, was passed in 1878 to prohibit the use of military forces by any civilian "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress."[59] This strict Congressional interpretation of the Army's domestic role was underscored by the passage of 18 U.S.C., sections 592 and 593, prompted by the frequent misuse of troops during Reconstruction elections, expressly prohibiting the use of armed forces to supervise the electoral process unless it is "necessary to repel armed enemies of the United States." Nor have contemporary Congresses been less zealous in restricting the domestic activities of the military. Under 18 U.S.C., section 1384, for example, military police are empowered to take necessary measures to control prostitution in the vicinity of military bases, but they are expressly prohibited from making "*investigations*, searches, seizures, or arrests of civilians charged with violations of this section" (emphasis supplied).

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[59] The legislative history of the statute indicates that it was intended to eliminate the unauthorized use of troops by federal law enforcement officials, a practice that had become so pervasive and scandalous by 1878 that ". . . generals commanding military departments . . . report the employment, hundreds of times, of hundreds of detachments of the . . . Army in the suppression of strikes, . . . execution of the local laws, . . . collection of revenues, . . . [and] arrest of offenders at the request of . . . marshals." Remarks of Representative Ellis, 7 Cong. Rec. 3850 (1878). Representative Knott, one of the other sponsors of the House bill, noted that "[c]ivil law is made for the protection of the people and is paramount to any officer of any grade in the Army, from a corporal up to the Commander in Chief. The subordination of the military to the civil power ought to be sedulously maintained." *Id.*, at 3849.

The courts have not been unmindful of the force of these statutes and their impact on the justiciability of challenges to unauthorized military action not connected with the conduct of a war. Speaking of the Posse Comitatus Act, the district court in *Wrynn* v. *United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961), emphasized that "[i]t is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing 'the inherited antipathy of the American to the use of troops for civil purposes.'" Echoing this concern, the Court of Appeals below held that the plaintiffs' claim of ultra vires military activity is justiciable because "[i]t is highly important for the safety of the country that to the extent consonant with the performance of the military's mission a *separation of sensitive information and military power be maintained, as a separation of match and gunpowder*" (App. 146) (emphasis supplied).

III.

Plaintiffs Have Standing to Adjudicate These Claims —if Indeed the Question of Plaintiffs' Standing Is Properly Before This Court.

A. The issue of plaintiffs' standing was not raised in the courts below.

Throughout this litigation, the government has been shifting its ground continually, but it had never squarely raised the issue of plaintiffs' standing until reaching this Court. In the District Court, Judge Hart dismissed the complaint on the basis of the government's argument that it alleged no unconstitutional conduct on the part of the Army—holding on the merits that there was no claim upon

which relief could be granted because plaintiffs were accusing the Army of conduct in which it had every right to engage (App. 126).

In the Court of Appeals, the government sought to uphold Judge Hart's ruling on the ground that the plaintiffs had failed to present the lower court with a justiciable controversy, in the sense that "justiciability requires that plaintiffs demonstrate that the following are judicially identifiable: a right in the plaintiffs, a duty of the defendants, a breach of that duty, and a remedy within the power of the court." (Brief for Appellees, at 16.) This was the issue decided by the Court of Appeals—and it was decided adversely to the government's contentions.

In its brief in this Court, the government has suddenly shifted its ground again—without benefit of the new ground having been briefed or decided below—and now asserts that plaintiffs' claims lack sufficient focus and concreteness to present the constitutional issue in an adversary context, relying in the main upon dicta in *Flast* v. *Cohen*, 392 U.S. at 95.[60] While it is true that the concept of justiciability is one "of uncertain and shifting contours," *Flast* v. *Cohen, supra* at 97, that does not mean that litigants can shift the contours of their legal argument during various stages of a single proceeding. On the contrary, it is well settled that this Court will not decide issues not

[60] The issue was obliquely mentioned in footnote 20 of the government's brief below, and evoked a brief response from the Court of Appeals in footnote 17 of its opinion (App. 140): "To the extent that the Army's argument against justiciability here includes the claim that appellants' lack standing to bring their action, we cannot agree."

Plaintiffs suggest that these two brief footnote references in the Court of Appeals do not establish that the issue was properly raised below.

properly presented to the courts below. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1971). The question of standing was not even raised by implication in the government's justiciability argument below.

"Justiciability is not a legal concept with a fixed content or susceptible of scientific verification," *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961). Indeed it is a "term of art employed to give expression to a [a] *dual* limitation" placed upon the federal courts by the case and controversy doctrine." *Flast* v. *Cohen, supra,* at 95 (emphasis added). One wing of that doctrine limits the judiciary to considering questions presented in an adversary context and in a form capable of resolution through the judicial process. The other limits the court's intrusion into areas committed to other branches of government. *Id.*

The plaintiffs recognize that "standing" to adjudicate is at times an aspect of justiciability and a corollary to it, but that is only true of that wing of the doctrine having to do with *adversity.* Standing to adjudicate was not part of the justiciability argument pressed by the government in the Court of Appeals. The government's argument below was in fact addressed to that aspect of the doctrine dealing with judicial identification of *a duty and its breach,* and judicial effectuation of a remedy—an argument related to a separation of powers contention which would restrict the judiciary from intruding into the domain of parallel branches of government.

On the other hand, "when *standing* is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and *not* whether the issue itself is *justiciable.*" *Flast, supra,* at 99-100 (emphasis supplied). The government raised only the latter issue in the court

below; accordingly, it ought not to be permitted to inject a new issue at this stage in the litigation.

Nevertheless, the plaintiffs will respond to the government's arguments that they lack standing to sue and demonstrate that the government's position is frivolous even though it is not properly before this Court.

B. Plaintiff individuals and organizations have standing to assert both their claims and the claims of others similarly situated.

The rules concerning standing to sue are designed to test whether a litigant is "a proper and appropriate party to invoke federal judicial power." *Flast* v. *Cohen,* 392 U.S. at 102. In First Amendment cases, these rules require that there be a logical connection between the status of the party who is suing and the issues which he seeks to raise. When a member of the public challenges governmental action on constitutional grounds, therefore, "it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. at 102. Where the claimant's status would be logically affected by the activity or the statute which he is challenging, such as where a taxpayer is challenging the expenditure of public funds, *Flast* v. *Cohen, supra,* or where a group of draft registrants is challenging a draft classification procedure, *NSA* v. *Hershey,* 412 F.2d 1103 (D.C. Cir. 1969), the claimant has a "personal stake in the outcome of the controversy," *Baker* v. *Carr,* 369 U.S. at 204, and he has standing to sue. See also *Jenkins* v. *McKeithen,* 395 U.S. at 417.

1. *There is a logical nexus between the plaintiffs' status and the First Amendment issues they seek to adjudicate.*

It is the plaintiffs' contention, amply supported by recent decisions broadening the principles of standing to raise First Amendment issues in public actions, *Flast* v. *Cohen, supra; Allen* v. *Hickel,* 424 F.2d 944 (D.C. Cir. 1970); *Wolff* v. *Selective Service Local Board No. 16,* 372 F.2d 817 (2d Cir. 1967), that their status as individuals and organizations engaged in peaceful and legal political activity is sufficient by itself to bestow upon them standing to challenge the Army's surveillance of their activity. See Davis, *The Liberalized Law of Standing,* 37 U. Chi. L. Rev. 450, 457 (1970).

Indeed, since the evidence before the District Court indicated that the plaintiffs were not merely general subjects of Army surveillance but were specifically targeted in the intelligence reports (App. 13-21), the existence of a logical nexus between their status and the issues of this lawsuit is unquestionable. Under these circumstances the plaintiffs have standing because they have alleged that the Army is conducting a surveillance program which adversely affects their political activities, just as the plaintiffs in *Allen* v. *Hickel,* 424 F.2d, at 947, had alleged "that the defendants [were] proposing to devote Government park property to uses inconsistent with the Free Exercise and Establishment Clauses [the erection of a creche]," and the plaintiff in *Flast* v. *Cohen,* 392 U.S. at 85, had complained "that federal funds . . . were being used to finance instruction in . . . religious schools." [61]

[61] In *Flast,* where the plaintiffs could show no special injury and were limited to suing in their status as taxpayers, the Court divided the nexus test in two parts. First, it was necessary to establish the logical link between the litigant's status and the type of govern-

The political activities engaged in by the plaintiffs which define their status and the issues they are seeking to adjudicate, are indisputably protected by the First Amendment.[62] See, e.g., *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). The right to speak and organize in order to advance political views is the bedrock of our Constitution. "Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty." *Bates* v. *City of Little Rock*, 361 U.S. 516, 522-23 (1960). Moreover,

> "[our] form of government is built on the premise that every citizen shall have the right to engage in political expression and association. . . . History has amply proved the virtue of political activity by minority, dissident groups. . . ." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-251 (1957).

2. Plaintiffs allege injury in fact and are within the zone of interest protected by the constitutional guarantees they seek to enforce.

Even under the stricter rules of standing that apply to constitutional cases arising *outside* the First Amendment

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ment action attacked; and, second, it was necessary to establish the nexus between the plaintiff's status and the precise nature of the constitutional infringement alleged. *Id.* at 102. Even if the plaintiffs in this case were required to establish both links, they could easily do so. Their status as political activists is closely linked both to the Army's program of political surveillance and to the First Amendment rights it is claimed to infringe.

[62] Having filed no answer and having moved to dismiss, the government does not put in issue any of the allegations in the complaint and thus does not contest that the plaintiffs are engaged in pure First Amendment activities. See *supra*, n. 11.

area, the plaintiffs would nevertheless have standing to sue because they have alleged "that the challenged action has caused [them] injury in fact, economic or otherwise," and the interest they seek to protect is "arguably within the zone of interest to be protected . . . by the . . . constitutional guarantee in question." *Association of Data Processing Service Organization Inc.* v. *Camp*, 397 U.S., at 152-53.[63] Accord, *Barlow* v. *Collins*, 397 U.S. 159 (1970). Although this Court has held that it is not necessary to apply this stricter standard to First Amendment cases, the plaintiffs can demonstrate the quality of their standing and the frivolousness of the government's argument by showing that they meet the requirements laid down in *Data Processing* as well as those in *Flast*.

A chilling effect which amounts to a justiciable injury confers "standing to challenge the source of the chill on any person who plausibly alleges that he is chilled." *NSA* v. *Hershey, supra*, at 1119. See also *Lamont* v. *Postmaster General, supra; Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota, supra; Baggett* v. *Bullitt, supra; Talley* v. *California, supra*. The plaintiffs have "plausibly alleged" that their status as civilians attempting to engage in protected First Amendment activity gives them standing to complain that their First Amendment interests are in fact damaged by the inclusion of their names and political pro-

[63] "Injury in fact," of course, does not require a showing of financial or economic loss. "A person or a family may have a spiritual stake in First Amendment values sufficient to give him standing." *Association of Data Processing Service Org., Inc.* v. *Camp*, 397 U.S. at 154. Indeed, in *Allen* v. *Hickel*, 424 F.2d at 946, the plaintiff taxpayers had standing to complain about the construction of a creche even though "no Government funds [were] expended in the construction, maintenance, disassembly, or storage of the creche."

files in Army intelligence reports. Judge Wilkey's opinion below attests to the plausibility of their complaint:

> [T]he appellants are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all . . . have been the subject of Army surveillance reports. . . . Since this is precisely the injury of which appellants complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine. . . . (App. 140 n. 17).

The question of standing was treated in the same manner by Judge Friendly in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117 (S.D. N.Y. 1969) (three-judge court), *affirmed*, 401 U.S. 154 (1971). In *Wadmond*, the plaintiff law students brought suit challenging the constitutional validity of procedures for admission to the New York bar. The rule under attack required a candidate for the bar to furnish satisfactory proof to a character and fitness committee "that he believes in the form of government of the United States and is loyal to such government . . . ." Plaintiffs claimed that the rule violated their First Amendment rights because it had an impermissible chilling effect on persons contemplating admission to the bar, "notably law students, since they will fear lest becoming members in controversial organizations or engaging in protests will be taken to evidence lack of belief in the form of government of the United States or disloyalty to it." 299 F. Supp. at 126. The three judge court held that the plaintiffs had standing to challenge the procedures in question because they alleged injury in fact in the form of an inhibiting effect on the free exercise of their First Amendment freedoms. The court

went on to note that plaintiffs had "set themselves apart from the public at large sufficiently to have standing . . . ." *Id.* at 122.

In the instant case, plaintiff individuals have set themselves apart from the public at large and claim, in addition to the allegations of injury to their expressional rights, injury in fact to their First Amendment associational rights. They have been actively engaged in various political movements but now claim that the government's intelligence scheme deters them from fully exercising their right to associate with others for common lawful political aims. Specifically, they allege that their associational rights are abridged because the implementation of the Army's policy has inhibited others interested in their political cause from associating with them (App. 10-11).

The government, however, persists in characterizing the plaintiffs as persons whose willingness to come forward to challenge the Army belies their allegation that they are in fact injured.[64] This is an extraordinary perversion of the chilling effect doctrine, one of the main functions of which is to permit a claimant to vindicate the First Amendment rights of those who are not parties before the court precisely because they *are* inhibited by the challenged prac

[64] The government claims support for this proposition in a remark, taken out of context, during oral argument by plaintiffs' counsel that plaintiffs "are not people obviously who are cowed and chilled" (Gov't. Brief, p. 36). In context, the remark indicated that the plaintiffs were not deterred, as others were, from instituting this lawsuit. (Transcript of Proceedings, United States District Court for the District of Columbia, April 22, 1970, at 17.) As the court below indicated, moreover, "the fact that these particular persons are sufficiently uninhibited to bring this suit [should not be] any ground for objecting to their standing. See *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958); *Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678, 684 (1970)" (App. 140).

nce. This was clearly pointed out by the Court in *NAACP* v. *Alabama,* 357 U.S. at 459:

> To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. . . . The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. See Barrows v. Jackson, 346 U.S. 249, 255-259, 97 L.Ed. 1586, 1594-1597, 73 S.Ct. 1031; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 183-187, 95 L.Ed. 817, 859-862, 71 S.Ct. 624 (concurring opinion).

See also *Dombrowski* v. *Pfister, supra,* at 486; *DuBois Club* v. *Clark,* 389 U.S. 309, 314-15, 318 (1967) (Douglas, J., dissenting); *NAACP* v. *Button, supra,* at 432; *Straut* v. *Calissi,* 293 F. Supp. 1339, 1342, n. 8 (D.N.J. 1968); *Anderson* v. *Sills,* 106 N.J. Super. 545, 554 (Ch. Div. 1969), *rev'd on other gds,* 56 N.J. 210 (1970). See generally, Comment, *The First Amendment Overbreadth Doctrine,* 84 HARV. L. REV. 844, 854-56 (1970).

To accept the government's argument would be to foreclose the right of *any* person to bring a suit in which he alleges the inhibition of a full exercise of his First Amendment rights. Indeed, this Court has observed that "[t]o require that [the right] be claimed by the members [of an organization, who prefer to remain anonymous] would result in nullification of the right at the very moment of its assertion." *NAACP* v. *Alabama,* 357 U.S., at 459. See also *NAACP* v. *Button, supra; Bates* v. *City of Little Rock, supra.* Under these circumstances the courts have long

understood that "there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters." *Anderson* v. *Sills*, 56 N.J. 210, 221, 265 A.2d 678 (1970). Cf. *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Straut* v. *Calissi, supra.* See generally Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970).

The plaintiffs' standing, therefore, must be assessed in light of their challenge to a governmental practice which has "an inhibiting effect [on] the flow of democratic expression and controversy upon those directly affected and those touched more subtly." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 248 (1957). See also *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940). Indeed, one aspect of the plaintiffs' injury which illustrates the quality of their standing is that "those touched more subtly" by Army surveillance are deterred from associating with the plaintiffs. By singling them out for surveillance the Army has driven a wedge between plaintiffs and others "who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate." *Watkins* v. *United States*, 254 U.S. 178, 197-98 (1957). This Court is well aware that the effect of such targeting, when it becomes publicly known, can result in public harassment of unpopular groups or individuals, and, in some instances, imposition of a stamp of disloyalty. *Sweezy* v. *New Hampshire*, 354 U.S. at 248. See also *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Bates* v. *City of Little Rock, supra; NAACP* v. *Alabama, supra.*

The most obvious example of those "touched more subtly" by Army surveillance, of course, are the rank and file members of the plaintiff organizations, whose rights

they have standing to vindicate. *NAACP* v. *Alabama, supra; Joint Anti-Fascist Refugee Committee* v. *McGrath, supra.* Even though the names of the members may not be memorialized in Army files and dossiers, their freedom of association is chilled when they are inhibited by the Army's activity from renewing their organizational ties, or when others are dissuaded from joining them. *Bates* v. *City of Little Rock, supra,* at 524. Cf. *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293 (1961). The evidence on remand will show that Army surveillance had such an effect on the plaintiff organizations and their present and prospective members.[45]

Nor can there be any question that the interests plaintiffs seek to vindicate are "arguably within the zone of interests" protected by the First Amendment. Plaintiffs seek to vindicate rights of speech, association and assembly, rights at the core of the Amendment. Cf. *Investment Company* v. *Camp,* 400 U.S. 45 (1971).

Finally, the plaintiffs' standing is enhanced by the very nature of the governmental activity they are challenging. "[S]tanding to challenge official action is more apt to exist when that action is not within the scope of official authority. . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 156 (Frankfurter, J., concurring). See also *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94 (1902). Cf. *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968). In this case the plaintiffs specifically allege that the military surveillance program exceeds the lawful needs and authority of the United States Army. . . ." (App. 11)—that is, that the program as it has been con-

[45] See n. 34, *supra.*

ducted is unsupported by any statute or the Constitution, and is, therefore, illegal at its roots.

This is extremely significant, since the "source of a chilling effect" is one of the chief considerations in determining whether those who have been touched by it have standing to challenge it in court, *Davis v. Ichord*, 442 F.2d 1207, 1214 (D.C. Cir. 1970); cf. *NSA* v. *Hershey*, 412 F.2d 1103 (D.C. Cir. 1969); *Wolff v. Selective Service Board*, 372 F.2d 817 (2d Cir. 1967). When that source is a governmental activity which is itself "unauthorized and contrary to law," *NSA* v. *Hershey, supra*, at 1123, the standing of a party who has "plausibly alleged" injury is beyond question.

Plaintiffs, of course, also have standing to challenge the invasions of their own privacy separate and apart from their standing to challenge the other unlawful aspects of the government's activity.

IV.

This Case Cannot Be Mooted by the Army's Assertion That Its Domestic Surveillance Activity Has Been Reduced.

There are hints in the government's brief, although no outright claim, that this case is mooted because of actions taken by the defendants subsequent to the filing of the complaint in the District Court. (See Gov't. Brief at 9-10, 34.) Specifically, the government suggests that the March 6, 1970 Department of the Army Memorandum for the Chief of Staff (*Id.*, p. 53) and the Department of the Army order of June 9, 1970 (*Id.*, p. 45) have effectively eliminated any need for granting the plaintiffs relief.

If the government does take the position that the case is moot because its entire intelligence gathering apparatus has been dismantled, that is a question properly decided only by the trial court upon evidence. In fact, plaintiffs could show at trial that a substantial portion of the apparatus, and the information which it has collected, is still in existence.

Even the self-serving statements of Department of Defense personnel (as distinguished from the unsubstantiated assertions of the government's brief writers) do not support the claim that the system has been dismantled. In testimony before the Senate Subcommittee on Constitutional Rights, for example, Assistant Secretary of Defense (now Secretary of the Army) Robert F. Froehlke admitted on March 2, 1971 that the Army had not developed an effective mechanism for implementing its new restrictive policy on surveillance—highly touted in the government's brief as the "June 1970 Collection Plan." (Gov't Brief, at 9-10, App. B.) The following colloquy between Secretary Froehlke and Senator Kennedy is significant:

> Senator Kennedy: And you are not maintaining any information then on any individuals at the present time who are involved in any civilian disturbances or have been involved in any protests?
>
> Mr. Froehlke: Only under the policy that we now have. It does allow it under certain circumstances, but in all cases a civilian official would first have to give his approval.
>
> Senator Kennedy: At what level of government?
>
> Mr. Froehlke: A Presidential appointee.
>
> Senator Kennedy: And what criteria does he use?
>
> Mr. Froehlke: Judgment, his judgment.

Senator Kennedy: Completely a subjective determination?

Mr. Froehlke: As of this moment, yes. A new council has been formed. I am Chairman of the Council. This is one of the things to which we will have to address ourselves, do we want to set criteria?

Senator Kennedy: What kind of criteria?

Mr. Froehlke: I am really not prepared to answer that question. I am not hedging. I have not thought the particular problem out. (Ervin Hearings, vol. I, p. 435).[66]

Judge Wilkey was correct, therefore, in writing for the majority below, that the Department of the Army's new directives did not dispose of the matter, and that the District Court should

> . . . hear evidence; ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights. [App. 146-47]

Whether or not the directives of the Department of the Army satisfy plaintiffs' complaint is a matter of dispute. This dispute can only be settled by an examination of evidence relating to Army surveillance after the directives were promulgated. Since this determination will require a

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[66] In his prepared statement of the Defense Department's position, Secretary Froehlke had earlier remarked to the Subcommittee that

> [o]n March 20th [1970], the Army took action to have all copies of civil disturbance publications Volume I: Cities and Organizations of Interest, and Volume 2: Personalities of Interest, known as the Compendium, destroyed. A certificate of destruction was requested. *The destruction of all copies has not yet been assured.* (Ervin Hearings, Part I, p. 394.)

hearing and presentation of evidence by both sides, it can only be made by the District Court, in accordance with Judge Wilkey's opinion.[67]

Furthermore, where, as here, the only issue before the Court is justiciability, and there is thus no chance of this Court rendering a far-reaching decision on the merits of an important constitutional issue, the judicial concerns about deciding constitutional issues in the context of a moot claim are absent, and the Court may follow without hesitation the normal procedure of leaving factual issues for the determination of the trial court on remand.

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[67] Moreover, even if it could be determined that the Secretary's directives rectified the situation complained of by the plaintiffs, there is still a controversy as to whether or not the Army is free to revert to this activity in the future. The case law establishes a Court policy of not permitting defendants to escape an adverse injunction by temporarily refraining from the complained of activity.

That policy was forcefully articulated by this Court in *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944):

> Despite the respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. *Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.* (Emphasis added.)

See also *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968); *Division 1287 of Street Elec. Ry. & Motor Coach Employees of America* v. *Missouri*, 374 U.S. 74, 77-78 (1963); *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515 (1911) ("[c]onsideration ought not to be . . . defeated by short term orders, capable of repetition yet evading review").

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals remanding this case to the District Court for trial should be affirmed.

Respectfully submitted,

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APPENDIX

Chilling Effect: A View From the Social Sciences*

A. *Introduction to the Social Science Data*

The sociological, political, and psychological processes which result in a chilling effect on political action are

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*Plaintiffs' Counsel gratefully acknowledge the assistance of the following persons in the preparation of this appendix:

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(footnote continued on following page)

receiving renewed attention in the social sciences. The reappearance of chill as a social issue is one good indicator that certain repressive social forces which have been present intermittently throughout the long history of this nation threaten once again to rise into dominance. An atmosphere of public fear prevailed during the witch hunts of Salem, the repressions of the Alien and Sedition Acts, the silencing of critics of slavery through the firing of teachers and ministers in the pre-Civil War South, the Red scare of post-World War I, the early and more recent tactics against union organizing activity, the anti-Japanese measures during World War II, and the anti-Communist fervor of the McCarthy era.[1]

Dr. H. H. Wilson,
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Dr. P. G. Zimbardo,
Professor of Psychology, Stanford University;

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[1] For some pertinent sources from a very extensive literature, see: Zechariah Chafee, Jr., *Free Speech in the United States;* Marion L. Starkey, *The Devil in Massachusetts;* John C. Miller, *Crisis in Freedom: the Alien and Sedition Acts;* James M. Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties;* Russell B. Nye, *Fettered Freedom;* Clement Eaton, *Freedom of Thought in the Old South;* Robert K. Murray, *Red Scare: A Study of National Hysteria, 1919-1920;* Morton Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation;* Eleanor Bontecou, *The Federal Loyalty-Security Program;* John Lord O'Brian, *National Security and Individual Freedom;* Fred J. Cook, *The Nightmare Decade;* Walter Gellhorn, *Security, Loyalty and Science;* John Henry Faulk, *Fear on Trial;* Dalton Trumbo, *Additional Dialogue;* and John Cogley, *Report on Blacklisting.*

Democratic politics is predicated on the belief that people can reason, grow and change. Anxious men are rarely free men. Those tormented by the thought that it may have been an exercise of freedom that cost them their jobs, deferments, civil rights or liberties—but who never know for sure—are not likely to develop the strengths political democracy needs. Surveillance serves to chill thought and to discourage the risks of freedom.

By chilling effect we refer to any diminution in or inhibition of the expression of legitimate political behavior in response to governmental practices. It is, in the instant case, the diminution and inhibition of political behavior as a result of military surveillance of legitimate political activity.

By surveillance we do not mean limited record-keeping of the conventional type necessary for the functioning of a specific organization or institution. Surveillance in *Webster's Dictionary* is defined as "a watch kept over a person, especially a suspect." In common usage, surveillance implies that some actor or entity (in the instant suit, the military) subjects to scrutiny another actor or entity because the probability exists that the person surveilled is doing something contrary to established practice. Criminal suspects are kept under surveillance, while industrial workers, for example, are only supervised. Supervision involves also the notion of keeping watch over a performance, but does not intimate that the performance is illegitimate in some way. Similarly, newspaper investigations involve only reportorial functions, and carry no such negative connotations.

By legitimate political behavior we mean behavior which does not deviate from accepted legal norms. These norms or standards of action are the result of past experiences

and historical solutions to the problems of democratic participation.[2] Surveillance implies in the public's mind that a judgment has been made by a governmental unit that the behavior surveilled is not within the range of legitimate political behavior.

The application of surveillance stigmatizes, i.e. it labels as deviant and illegitimate the behavior of those involved in protected political expression. The deviant label has grave consequences for the individual so designated.[3] Chill occurs as a result of this stigmatization.

The charge that protected behavior is chilled by military surveillance is supported by a great deal of data extracted from psychological investigations. The occurrence of chill is a recognized and normal response to threatening social situations, which people have learned to categorize as threatening because of their own or other people's past experiences in similar situations. This is a case of social learning called avoidance behavior which is acquired directly or vicariously.[4] Among the several factors which facilitate the response of chill to surveillance are, in the terms used by psychologists: the power or authority of the surveillance agent; evaluation apprehension (the

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[2] See generally, Harry Eckstein, *Division and Cohesion in Democracy* (Princeton: Princeton University Press, 1966); Lucian Pye and Sidney Verba, eds., *Political Culture and Political Development* (Princeton: Princeton University Press, 1965); Alexis de Tocqueville, *Democracy in America*, ed. by J. P. Mayer (Garden City, New York: Doubleday and Company, Inc., 1969); and A. D. Lindsay, *The Modern Democratic State* (New York: Oxford University Press, 1947).

[3] Edwin M. Schur, *Labeling Deviant Behavior: Its Sociological Implications* (New York: Harper and Row, 1971), 7-36. See also Erving Goffman, *Stigma: The Management of Spoiled Identity* (Englewood Cliffs, N. J.: Prentice Hall, 1963).

[4] A. Bandura, *Principles of Behavior Modification* (New York: Holt, Rinehart and Winston, 1969).

anxiety which occurs to someone whose behavior is being judged); the probabilistic nature of perception; the uncertainty and ambiguity of the surveillance situation; and the phenomonological experience of the person being surveilled, as to his anonymity or deindividuation.

These psychological principles which describe human behavior are tied together by the nature of the human perceptive process itself: people must first define a situation before they respond to it. This definition is reached by individuals as they unite all the discrete elements of the situation into their respective meaningful categories. Individuals categorize different objects, events, and people into classes and proceed to respond to them as a function of their classification rather than as a function of their uniqueness.[5]

In categorizing apparently different stimuli (e.g. political meetings, knowledge of surveillance by the military, and sanctions in the past which have stemmed from these situations) into the same class—"a threatening situation"—individuals have chosen certain aspects of the situation which are critical or relevant, and have discarded others which are irrelevant. This class is named ("a threatening situation") and then provides direction for the individual's activities so that he knows in advance what are the appropriate and inappropriate actions for him to take.[6] Surveillance is one class of events under which the individual categorizes particular events as potentially threatening and then functions appropriately in terms of his own well-being, to avoid or minimize the perceived possible negative consequences.

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[5] J. S. Bruner, J. J. Goodnow, and G. A. Austin, *A Study of Thinking* (New York: Wiley, 1956).

[6] *Ibid.*

B. *Chill: Theoretical and Empirical Bases*

The very act of the government's surveillance of an individual or group engaged in dissent tends to define the activities of the individual or group as being in some sense illegitimate. Surveillance, in American society, is traditionally reserved for those individuals and groups which in some way are presumed to be engaged in illegitimate activities. This traditional American use of surveillance is in contrast to its use in totalitarian societies, where surveillance is an intrinsic control device used by the government power elite to maintain the governmental structure.[7]

Critical literature about Eastern Europe, the U.S.S.R. and Nazi Germany demonstrates the caution, passivity and terror of citizens who have been taught that dissent is dangerous. In these foreign non-democratic political systems, comments, telephone calls, mail, writings, associations and actions are watched. There are consequences for "wrong" sentiment and behavior. Citizens learn by grim example to police themselves rather than to test the system and thereby invoke punishment for being "unreliable."

The general popular assumption is that surveillance means control, concurrence and the ultimate "retooling" of thought. As Hannah Arendt has written,

> In a system of ubiquitous spying, where everybody may be a police agent and each individual feels himself under constant surveillance; under circumstances

[7] Carl J. Friedrich and Zbigniew K. Brzezinski, *Totalitarian Dictatorship and Autocracy* (Cambridge, Mass.: Harvard University Press, 2d ed., 1965). Also see William Kornhauser, *The Politics of Mass Society* (Glencoe, Ill.: Free Press, 1959); Andrei D. Sakharov, *Progress, Coexistence and Intellectual Freedom* (New York: Norton, 1968); and Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, 1951).

> moreover, where careers are extremely insecure and where the most spectacular ascents and falls have become everyday occurrences, every word becomes equivocal and subject to retrospective interpretation.[8]

Similarly, in the United States, a public which is aware of the existence of a governmental surveillance program will consciously or unconsciously limit or alter the scope of expression of its political beliefs, both in the present and the future. Surveillance by the government of a particular group can have a real and measurable effect on that group, as well as repercussions on the quality of political expression throughout all of society.

There are, in general, two processes which result in chill. In the first, an individual knows about (or perceives that such is the case without direct knowledge) surveillance and the accompanying record-keeping activities which are directed at groups engaged in legitimate political activity. As a result he, along with others, redefines the *legitimate* political activities as *illegitimate* and is therefore reluctant to act on his political beliefs. He has been "prevented" from taking part himself and in turn becomes intolerant of the activity. He is now himself part of the mechanism of this redefinition.

In the second process, the individual knows about (or perceives) surveillance and record-keeping directed against legitimate political groups. He also knows that records are sometimes misused. As a result he modifies his form of political expression because he is afraid of the consequences of a record of his presence being kept and later misused or misinterpreted. Both processes can occur simultaneously.

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[8] Arendt, *op. cit.*, 431.

Psychological literature recognizes four categories of responses which, in the surveillance situation, cause chill:

1) individuals perceive and categorize surveillance situations as threatening, on the basis of their needs, past experiences, and expectations;

2) individuals respond to surveillance situations in such a way as they conceive appropriate to this categorization;

3) individuals learn to avoid threatening situations based on the principles of discrimination, avoidance, generalization, vicarious learning, and aversive conditioning; and lastly,

4) the social psychological factors of power and authority, evaluation apprehension, uncertainty and ambiguity, and anonymity and deindividuation influence how the individual perceives, categorizes, and responds to the stimuli.

Herbert Hyman has asked the following question[9] in his research: what difference between the phenomena experienced by citizens in England and America respectively, in their political environments, could account for the more widespread intolerance of political deviation on the part of Americans in the 1950s, than was the experience in England during the same time? He concluded that the contributing factor was that Americans experienced a far greater amount of official investigative activity (such as

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[9] Herbert H. Hyman, "England and America: Climates of Tolerance and Intolerance" (1962) in Daniel Bell, ed., *The Radical Right* (Garden City, New York: Doubleday and Company, Inc., 1963), esp. 298. Hyman is Professor of Sociology at Wesleyan University in Middletown, Connecticut.

security checks and publicly visible surveillance of non-conformists) than did the English. Such activity in the United States led to a widespread activation of intolerant attitudes on the part of citizens. This led to citizen oppression of other citizens who were labeled as non-conformists. Also, the surveillance practices had created an atmosphere of fear among the sub-groups which had been so labeled by the investigative activities.

Another classic exploratory study[10] of the psychological effects of surveillance attempted to evaluate the impact of governmental loyalty and security inquiries. Marie Jahoda and S.W. Cook questioned in depth 70 professionals in federal positions and 15 faculty members in universities, all in the Washington, D.C. area. The investigators felt that the impact of security measures depended upon how people perceived the measures as well as on the actual measures that were taken. In fact, their underlying proposition was that the "social psychological consequences of a social policy can, but need not, coincide with the purposes for which the policy was designed." [11]

Jahoda and Cook found that people responded to the entire situation as defined by the prevalent atmosphere or climate of thought, rather than perceiving and responding only to the specific official and unofficial security measures which were taken. In responding to the global situation, people began to adhere or to fear that they must adhere to more specific and concrete codes of behavior than they had traditionally observed. After this occurred, people often internalized the newly accepted standard or code. They per-

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[10] Marie Jahoda and S. W. Cook, "Security Measures and Freedom of Thought," 61 *Yale Law Journal* 296-333 (1952).

[11] *Ibid.*, 298.

ceived it as one to which they voluntarily complied rather than as one which was forced upon them as a consequence of the pervasiveness of a climate of thought. Examples of the behaviors which changed as a result of the foregoing process were: 1) severing of membership in organizations on the Attorney General's list and cancelling of subscriptions to literature sent by these organizations; 2) refusing to sign petitions without proof of a bona fide sponsorship; 3) refraining from joining an organization *not* on the Attorney General's list for fear it might turn out to be a communist front or might perhaps later develop in a radical direction; and 4) being cautious in political conversations with strangers.

The authors stressed that respondents were often unable to distinguish between "founded" and "unfounded" fears and allegations because of the climate of thought which prevailed. This resulted in the stigmatization of anyone who was investigated, either officially or unofficially. The penalties which the respondents felt were incurred by those being investigated included personal agony, damage to physical health, legal expenses, mental agony, and loss of reputation. Respondents also perceived that a subsequent clearance of any charges made by the government did not provide relief, because 1) fears continued to exist that an investigative file would be reopened; 2) suspicions of others were not erased by a mere clearance of the charges (in fact, files *were* reopened based on this continuing suspicion); and 3) those under scrutiny were judged on the basis of the past, not the present, and therefore knew that their present activity might well come under scrutiny in the future. People know that the climate of the times will

change many times within the span of one life. The investigators concluded that:

> [T]he hazards of *being investigated*—even if one is subsequently cleared—are so great that individuals are induced to limit their behavior by avoiding (or trying to avoid) anything that might conceivably arouse anyone's suspicion and thus lead to charges and an investigation.[12]

It must be stressed, as did Jahoda and Cook, that an individual does not respond to a specific administrative measure or event but instead perceives that specific event as an integral part of related activities, a class of events, and thus responds to these interrelated measures. The specific events of government security measures taken in the 1950s were categorized by individuals as psychologically salient elements of the category "surveillance," particularly with respect to people's perceptions of the government measures. From the responses reported, we have an indication of the type of responses an individual makes under conditions of surveillance. These responses determine the individual's perception of what actions may be appropriate or inappropriate in *other* situations. By being aware of the operation of a system which is categorized as surveillance, and in responding to the total situation or climate of thought, respondents in the study (as is evidenced by their own limiting of activities) were in fact chilled.

The experiences which people have with the political process are key factors which determine the psychological preconditions needed for a democratic or participative political system. Since the key to political democracy is not that citizens be always active (i.e. acting politically) but

[12] *Ibid.*, 318.

that they be "potentially active,"[13] the public's reactions to various political experiences, such as surveillance, are of the utmost importance. The potentially active public is deterred from participating because the surveillance of the politically active public effectively neutralizes the participative incentive which might have appealed to the potential actor. The dynamic of potential activity is in this way eliminated, and the psychological precondition needed for a participative political system is absent.

An individual's political behavior, as well as his social behavior, contains an historical dimension. For example, as the result of past political experiences in which dissenting political activity was severely sanctioned, German and Italian adults today feel greatly limited in their freedom of political communication. The empirical finding[14] is that they feel more restricted than do Americans and British in discussing political and governmental affairs. The habits and feelings developed during these earlier periods have persisted into the present, "despite the formal freedoms of the contemporary German and Italian political systems."[15]

Evidence that governmental policies or practices affect the scope of political expression should be taken very seriously, since these findings from Germany and Italy strongly

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[13] Gabriel A. Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton: Princeton University Press, 1963), 481.

[14] *Ibid.*

[15] *Ibid.*, 119. Also see Dennis W. Brogan, *Citizenship Today: England, France, the United States* (Chapel Hill, N. C.: The University of North Carolina Press, 1960); and Lester Milbraith *Political Participation: How and Why Do People Get Involved in Politics* (Chicago: Rand-McNally, 1965).

suggest that negative sanctions, when applied to political activity, have a chilling effect not only on current levels of expression and participation but also have long-term inhibiting effects that may last from 20 to 30 years or more.

There is evidence that intelligence gathering units are acutely aware of their ability to stigmatize a group and inhibit their political expression by engaging in surveillance.[16] Because surveillance is practiced secretly and the information it produces is kept secret, no citizen involved in political dissent can ever be certain that he is or is not under scrutiny—once he becomes aware that some people in his situation are. This condition of uncertainty gives rise to anxiety and to the suppression of his normal political responses.[17]

Just as important, if not more so, those who are not already involved in political activity are more likely to be reluctant to participate politically. The sociological literature in deviant behavior amply documents the extent to which individuals avoid assuming stigmatized roles.[18] A

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[16] For one example only, see Robert Wall, "Special Agent for the FBI," *New York Review of Books*, vol. 12, no. 1, pp. 12-18. Generally, see *Privacy and the Rights of Federal Employees*, Subcommittee on Manpower and Civil Service of the Committee on Post Office and Civil Service, House of Representatives, 90th Congress, 2d session, June 1968. See also the FBI Media, Pennsylvania document which encourages agents to make their presence known to members of the New Left in order to generate paranoia among them by fostering the belief that "there is an FBI agent behind every mail box," in Frank Donner, "The Theory and Practice of American Political Intelligence," *New York Review of Books*, April 22, 1971, p. 27. This last quotation on paranoia has been very widely publicized; see for example, "FBI Files Tell of Surveillance of Students, Blacks, War Foes," *New York Times*, March 25, 1971, pp. 1 and 33.

[17] Bandura, *op. cit.*

[18] Marshall Clinard, *Sociology of Deviant Behavior* (New York: Holt, Rinehart and Winston, 1968), 1-48. Also see Schur, *op. cit.*

frightening aspect of this situation is that individuals or groups who are only curious bystanders can also be stigmatized,[19] by being indiscriminately included in the lists of those present at the activity surveilled.

The phenomenon of chill is well described in the psychological literature as a special case of learning, called avoidance learning or aversive conditioning.[20] As a result of undergoing either direct or vicarious experiences, an individual's behavior comes to be regulated by stimuli that were present in the situation that preceded the responses. A very simple example of this principle of conditioning or learning is where a person stops when seeing a red light, because of having seen what can happen if he does not stop (negative reinforcement), and likewise learns to proceed when seeing a green light. The red light tells him to avoid crossing the street when the stimulus is present. In the surveillance situation at a peaceful demonstration, the actor's observation or belief that a military agent is present, watching his behavior, perhaps photographing and taking notes, is a stimulus to avoid the situation. He has learned either directly or vicariously (through the numerous media sources) that this surveillance has been and is taking place, and can lead to further investigation, permanent police records, and other negative consequences which would endanger his reputation, friendships, and livelihood.

The surveillance agent need not be recognized or obvious. Bandura[21] discusses how symbols, words, or knowledge can act as a stimulus and control behavior just as ef-

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[19] Goffman, *op. cit.*

[20] Bandura, *op. cit.*

[21] *Ibid.*

fectively as the external stimulus of a red light. Plaintiffs know that surveillance of political dissent meetings is being conducted, and their responses are controlled by this knowledge just as effectively as if there were men on guard in military uniform at the door.

Another principle of learning important to the surveillance situation and described by Bandura is the generalization of learning. This principle, demonstrated in many psychological experiments,[22] explains how a situation that one learns to avoid need not be identical to a prior situation where one has witnessed aversive consequences to himself or to someone else. Bandura concluded from these findings that where negative sanctions are applied to a wide range of social responses in diverse settings, one finds a large number of behaviors inhibited.[23] The surveillance case described in this lawsuit is such a situation.

Avoidance of a perceived dangerous situation can maintain effective control over behavior for a long period of time. This inhibitory control seems to be effective because the person who avoids a threatening situation feels relieved as a result of having avoided it. This feeling is reinforcing and strengthens the person's tendency to avoid future similar situations.[24]

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[22] See U. Desiderato, "The Relation of Repetitions in the Speech of Young Children to Certain Measures of Language Maturity and Situational Factors: Part I," 4 *Journal of Speech Disorders* 303-318 (1964); H. S. Hoffman and M. Flishler, "Stimulus Factors in Aversive Controls: the Generalization of Conditioned Suppression," 4 *Journal of Experimental Analysis of Behavior* 371-378 (1961); and W. H. Honig and R. M. Slivka, "Stimulus Generalization of the Effects of Punishment," 7 *Journal of Experimental Analysis of Behavior* 21-25 (1964).

[23] Bandura, *op. cit.*

[24] A. Bandura, "Influences of Models' Reinforcement and Contingencies on the Acquisition of Imitative Responses," 1 *Journal of Personality and Social Psychology* 589-595 (1965).

Other studies by Kanfer[25] on verbal behavior (speech) show that human subjects learn to inhibit speech by observing the negative consequences to others of specific speech behavior. People learn to internalize the information they gain from observing others, and are guided in subsequent situations by the anticipations of rewards and punishments. Also, people do not have to be aware of surveillance, or of their changed responses (such as inhibition of speech behavior), for a chill to have occurred. Krasner describes how people can change or decrease their verbal behavior without being aware of this change.[26]

Jerome Bruner has shown[27] that past experiences, needs, and expectations influence perception. In addition to perceiving situations in a particular way as a result of these influences, individuals confronted with stimuli which require a response will interpret the stimuli so as to make the appropriate response.[28] In ambiguous or complex situations individuals will attempt to structure the relevant situation or event in such a way that it is understandable.[29]

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[25] F. H. Kanfer, "Vicarious Human Reinforcement: a Glimpse Into the Black Box," in L. Krasner and L. P. Ullmann, eds., *Research in Behavior Modification* (New York: Rinehart and Winston, 1964), 244-267.

[26] L. Krasner, "Verbal Operant Conditioning and Awareness," in K. Salzinger and S. Salzinger, eds., *Research in Verbal Behavior and Some Neurophysiological Implications* (New York: Academic Press, 1967).

[27] Jerome Bruner, "Social Psychology and Perception," in E. Maccoby, T. Newcomb, and E. Hartley, eds., *Readings in Social Psychology* (New York: Henry Holt and Company, 3d ed., 1958).

[28] F. C. Bartlett, *Remembering: A Study in Experimental and Social Psychology* (Cambridge: The University Press, 1932).

[29] A. R. Cohen, E. Stotland, and D. M. Wolfe, "An Experimental Investigation of Need for Cognition," 41 *Journal of Abnormal and Social Psychology* 291-297 (1955).

Actual surveillance of an individual or group at a particular event, political or otherwise, is not an essential element for chill to occur. With public knowledge that surveillance of political activities has occurred and is continuing to occur, the individual's perception of the actual event has been influenced. Based on the expectation that surveillance might be going on, people exhibit the same verbal inhibitions as if they were certain through direct knowledge that a surveillance agent were present.

The need to protect oneself from being investigated, when coupled with the public knowledge that surveillance occurs at certain types of political meetings, can lead to the perception that it is occurring or will occur at a specific meeting in question. People will then respond to the meeting based not on what the actual social situation is, but on what past reality has taught them to expect it to be.[30]

When people are surveilled by the military at a demonstration and have no knowledge of the consequences of this surveillance, or of what behaviors are targeted specifically, or of who is being surveilled in particular, or of why the surveillance is being conducted in the first place, then the absence of predictability in the situation gives rise to uncertainty and anxiety. In fact, the results of studies of uncertainty and predictability have shown that individuals have a desire for predictability about a forthcoming unpleasant event, even if this knowledge will not keep the event from occurring. Not only is the predictability preferable, but it also arouses less anxiety.[31] People tend to avoid

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[30] Bandura, *Principles, op. cit.*, 300.

[31] J. T. Lanzetta and J. M. Driscoll, "Preference for Information About an Uncertain but Unavoidable Outcome," 3 *Journal of Personality and Social Psychology* 96-102 (1966); also see L. A. Pervin, "The Need to Predict and Control Under Conditions of Threat," 31 *Journal of Personality* 570-587 (1963).

these surveilled political events because they would have little or no control over the consequences of their behavior if they attended.

Another factor influencing both the individual's perception of political activities and his behavioral response to them is what is called in psychological literature "evaluation apprehension." This apprehension is an active anxiety that subjects feel when they are being evaluated. It leads the individuals to behave in a manner that will win a positive evaluation from the person who is judging him. In the situation discussed in this case, that would be the surveillance agent. Rosenberg[32] found that evaluation apprehension could be reduced by assuring the subject that his "public spiritedness" or "patriotism" would not be open to assessment or evaluative judgment. In this way, a more accurate self representation could be obtained. Rosenberg also learned that if the experimenter has some *power* over the subject, he will bias his responses so as to appear in conformity with most others.

The psychological consequence of concern over social evaluation (induced through awareness that one's behavior is under surveillance) is the arousal of anxiety. This anxiety raises the threshold for expression of all behaviors which could be judged as non-normative, deviant, atypical, or politically dissident. The overt consequences of such an internal state of "evaluation apprehension" are:

1) a likely avoidance of such evaluative situations;

2) a limitation or modification of the public speech or actions of the individual who is in such situations, so as

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[32] M. J. Rosenberg, "The Conditions and Consequences of Evaluation Appreciation," in R. Rosenthal and R. L. Rosnow, eds., *Artifact in Behavioral Research* (New York: Academic Press, 1969), 279-349.

to render the speech or action "acceptable" to the sponsors of the surveillance; and,

3) an arousal of feelings of shame and worthlessness by the individual who avoids such situations, if he is committed to those beliefs relevant to the situation. If he is not yet committed to the beliefs, he is likely to come to view those beliefs as illegitimate, as a direct consequence of the surveillance.[33]

Government surveillance agents can be used to enforce individual compliance to certain norms or standards of behavior. By observing and surveilling the individual or group in a situation where dissenting political speech is being displayed, the surveilling agents, who are authority figures, act as a pressure toward compliance with their own norms.[34] Kiesler and Kiesler have shown that an individual may re-evaluate not only his overt behavior because of the pressures produced by observation (surveillance), but also will reexamine his beliefs.[35] Thus, surveillance may interfere not only with verbal and other

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[33] Cf. L. Festinger, *A Theory of Cognitive Dissonance* (Evanston, Ill.: Row, Peterson, 1957) and P. G. Zimbardo, "The Cognitive Control of Motivation," in W. J. Arnold and D. Levine, eds., *The Nebraska Symposium on Motivation* (Lincoln: University of Nebraska Press, 1969), vol. XVII, 237-307.

[34] Charles A. Kiesler and Sara B. Kiesler, *Conformity* (Massachusetts: Addison Wesley Publishing Co., 1969). In an editorial column entitled "Big Brother Is Growing" (*New York Times*, Nov. 14, 1971), Russell Baker writes:

> "The object of unconcealed surveillance is not to get the goods on its man, but to plant fear of the state in his marrow, to keep his mind sensitive to the powers that the corporate state can bring to bear, if it chooses, upon him whose existence annoys it."

[35] Kiesler and Kiesler, *op. cit.*, 86.

opinion-related behavior, but may also act as a method of thought control.[36]

In an experimental situation, Milgram[37] illustrated the ability of legitimate authority figures to enforce compliance, when he was able to get subjects to administer what they believed to be painful shocks to other people at the instruction of a perceived legitimate authority. In commenting on the amount of compliance an authority figure could command, he states:

> [I]t is the extreme willingness of adults to go to almost any lengths on the command of an authority that constitutes the chief finding of this study . . . relatively few people have the resources needed to resist authority.[38]

The military, being the agent of authority as well as the agent of surveillance, provokes the individual's fear of subsequent negative consequences. The individual's response is the result of a belief that if he complies with the powerful agent (rather than resisting the latter's attempt to influence him), he can maximize his gains and minimize his

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[36] Jerome B. Wiesner (see below, footnote 88) has warned that the interconnecting communications hardware and new sophisticated techniques for data analysis may one day make it possible "to simulate patterns of behavior for individuals and social groups and attempt to predict or anticipate their behavior with the purpose of maintaining better surveillance. . . . In a way this was what the Army was doing when it selected antiwar organizers, speakers, and demonstrators for particular attention." See the Ervin hearings at 764, cited in full below in footnote 46.

[37] Stanley Milgram, "Some Conditions of Obedience and Disobedience to Authority," 18 *Human Relations* 259-276 (1965).

[38] Stanley Milgram, "The Compulsion to Do Evil," in *Pattern of Prejudice*, vol. 1, no. 6, November/December 1967 (London), 5.

losses in relation to the agent's ability to punish.[39] Berkowitz states that "anticipated punishment is a negative incentive which often causes the person to suppress actions that might bring about the noxious consequences."[40] Furthermore, the individual may attempt to hide his own opinions because they differ from those of the agents of power.[41]

Another body of psychological data which has a bearing on the chilling effects of surveillance comes from research on anonymity and deindividuation. Anonymity is provided by situations in which an individual perceives that his thoughts, speech, action and judgments cannot be identified by others as belonging to him. Deindividuation is the process by which individuals attempt to become anonymous or indistinguishable from others. When an individual is surveilled he loses his anonymity and attempts to deindividuate himself.

Deutsch and Gerard[42] have found that people experience less influence to conform to social norms when they are able to express their judgments anonymously, rather than when someone knows the source of the judgments. Similarly, Cantril[43] found a discrepancy between what one will say secretly in voting on a controversial issue and what

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[39] L. Berkowitz, "Social Motivation," in G. Lindzey and E. T. Aronson, eds., *The Handbook of Social Psychology*, 2d ed., vol. III (Reading, Mass.: Addison-Wesley, 1969).

[40] *Ibid.*, 73.

[41] K. Ring and H. H. Kelley, "A Comparison of Augmentation and Reduction as Modes of Influence," 66 *Journal of Abnormal and Social Psychology* 95-102 (1963).

[42] M. Deutsch and H. B. Gerard, "A Study of Normative and Informational Social Influences Upon Individual Judgment," 51 *Journal of Abnormal and Social Psychology* 629-636 (1955).

[43] H. Cantril, *Gauging Public Opinion* (Princeton: Princeton University Press, 1944).

one will say when one is identified. Zimbardo,[44] using soldiers from the Belgian army as subjects, has shown that conditions which led the soldiers to feel more conspicuous resulted in the inhibition of their overt responses, as compared to subjects who felt inconspicuous in the situations. In another study using New York University coeds, subjects who were made to feel that they were readily "individuated," distinguishable, or conspicuous because they were under the surveillance of the experimenters, were significantly more inhibited in their interpersonal responsiveness than were individuals who felt that they were secure from identification.[45]

C. *Contemporary Awareness*

Today in the United States there is mounting concern over the government's widespread surveillance activities. Ample empirical evidence from numerous sources shows that the American public is consciously aware of these activities and especially of those involved in this suit. The congressional hearings held by Senator Sam J. Ervin in February and March, 1971[46] indicate the visibility of public concern over the system of military surveillance of citizen political activities.

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[44] Zimbardo, *op. cit.*

[45] *Ibid.*

[46] "Federal Data Banks, Computers and the Bill of Rights." *Hearings* before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, February and March 1971, hereinafter referred to as the Ervin hearings. Also see the *Congressional Record* of September 8, 1970 for an earlier report by this Subcommittee on the extent of security and investigative files held by the Civil Service Commission and used interchangeably with other federal agencies.

The proliferation of books dealing with the "privacy debate" cannot be listed to any advantage individually, but the fact that they have been widely disseminated to the public, along with the attendant scholarly and popular magazine articles,[47] and with other media sources such as television topical coverages,[48] newspaper items, and editorials, should serve to put this Court on notice that the public *is* generally cognizant of the fact that systems of surveillance by government do exist.

In addition to this material there is other evidence of the public's consciousness of surveillance and record-keeping. Since this society is one which sociologically could be termed "organizational," interactions between individuals and organizations most often involve recorded transactions.

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[47] For an extended bibliographical listing, see the materials in Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967). Also see Arthur R. Miller, *The Assault on Privacy: Computers, Data Banks and Dossiers* (Ann Arbor: University of Michigan Press, 1971). For more specific activities of the House Internal Security Committee, see the disclosures by Representative Robert Drinan in the *Congressional Record*, April 29, 1971, where he says that HISC holds 754,000 files on individuals and groups, which are available to any Congressman upon request with absolutely no ban on publication of any file so acquired.

[48] A CBS-TV network documentary entitled "Under Surveillance," was broadcast December 23, 1971, and was seen by millions of viewers. It dealt with the government's investigation of political dissidents in Philadelphia, and concluded that the surveillance was "political surveillance in the sense that it is directed mostly at those who disagree with the government. But in private and public files there are dossiers on most of the rest of us as well."

The ABC-TV network broadcast a one hour documentary on surveillance on January 8, 1972, entitled "Assault on Privacy." It too was seen by millions of viewers, and concluded: " . . . our rights, our freedoms, our constitutional guarantees, the result of human thought and centuries of struggle, must be protected whether threatened by overzealous law enforcers or by mechanical brain. . . . But today in the United States of America there is a clear and present danger that they can prevail over us."

As a result, individuals have become oriented very early in life to making or maintaining a "good record," or sometimes to avoid if possible making any record at all (as is clearly the point with police records).[49]

The knowledge of what is now occurring[50] and the manner in which people today perceive the situation is strikingly similar to that which was reported by Jahoda and Cook[51] in 1952. When conceptualizing the contemporary events as belonging to the class of stimuli "surveillance," individuals also conceptualize the relationship between what surveillance is and other classes of events related to it, particularly the sanctions and penalties to which it may lead. As Jahoda and Cook stressed, the sanctions and penalties may not be officially administered, but still are

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[49] Generally, see Stanton Wheeler, ed., *On Record: Files and Dossiers in American Life* (New York: Russell Sage Foundation, 1965).

[50] The *scope* of what is occurring is a factor of the public's knowledge. Today, the FBI, the Secret Service, the House Internal Security Committee (HISC), the Bureau of Customs, the Passport Division, the Internal Revenue Service, the Intelligence Division of the Post Office, the Immigration and Naturalization Service, the Department of Justice, the National Science Foundation, the Housing and Urban Development Department, the Department of Health, Education and Welfare, and numerous State and local agencies conduct extensive intelligence operations which affect the lives of millions. HISC, to cite a specific example of the use to which such information may be put, has published a list of "radical" campus speakers and their affiliations, presumably as warning to innocent universities. But Judge Gerard A. Gesell of the Federal District Court in Washington has barred its publication or distribution because of the inescapable conclusion that the report sought to inhibit free speech. See the *New York Times*, October 29, 1970. Arthur Miller has estimated that the average American may be the subject of anywhere from ten to twenty dossiers. See the Ervin hearings, *op. cit.*, 9.

[51] See *supra*, footnotes 10-12.

the direct results of indirect administrative measures. Individuals modify their behaviors in accordance with their perceptions of the possible negative outcomes.

Recognizing this, noted historian Henry Steele Commager has advised that this nation must concern itself for its welfare, and has warned that "we may be witnessing, even now, a dissolution of the fabric of freedom that may portend the dissolution of the Republic." [52]

Clearly, some sectors of the public are responding to this threat, in part through a growing awareness of the dangers involved. This awareness has been documented in several relevant surveys, and the simple statistical results are very revealing. For example, one 1970 national sample survey on public reactions to computer uses[53] reports that 53% of the sample believed that computerized information files might be used to destroy individual freedoms, and 58% felt that computers will be used in the future to keep people under surveillance. Thirty-eight per cent believed that computers represent a real threat to personal privacy. Ninety-one per cent of those questioned felt that computers were used to compile information files on U.S. citizens, and 54% believed that these files were maintained for surveillance of activist or radical groups. People also indicated their general concern (62%) over the types of information being kept, and 45% said that political activity records should not be kept.

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[52] *Look* magazine, July 14, 1970.

[53] "A National Survey of the Public's Attitudes Toward Computers," published by and available from the American Federation of Information Processing Societies, Inc. (AFIPS) and TIME, Inc. (New York: November 1971).

Another survey[54] measured 56% of the respondents as being opposed to the creation of any primary national data bank. Forty-three per cent of respondents felt that already the government knew too much about their personal lives. Representative David R. Obey of Wisconsin has reported[55] that of nearly 10,000 constituents who responded to his questionnaire, 56% strongly feel that surveillance of the political activities of private citizens and public officials by military intelligence personnel should not be allowed to continue. This very lawsuit reflects precisely this public consciousness and sentiment.

This evidence is supported by another statement of concern which has manifested itself in the executive realm. A concise statement found in the Report of the White House Conference on Youth reads:

> There is a feeling among youth of an abrogation and diminution of civil rights in the United States, particularly with reference to . . . surveillances by various government agencies of the activities of politicians, political candidates, and politically active citizens, and those considered radical (whether to the left or the right of the political spectrum).[56]

In addition, the Conference indicated its concern over "a chilling effect that has resulted in a feeling of fear and intimidation among the youth, minorities, and a significant number of people in this nation and members of both houses of the United States Congress."[57] The chilling effect arises,

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[54] "A Survey of Public Attitudes Toward Technology," as reported in the *Sixth Annual Report* of the Harvard University Program on Technology and Society (December 1970).

[55] *Congressional Record*, October 20, 1971, E11080.

[56] *Report of the White House Conference on Youth, 1971*, 169.

[57] *Ibid.*, 171.

according to the Conference Report, because of "political surveillance of citizens who express themselves by engaging in protesting public policies." [58]

At a recent labor union conference in Washington, D.C., on various aspects of privacy, a hundred participants were surveyed and the results have a significant bearing on the issues at hand.[59] Almost half of the respondents felt that the Administration wanted to suppress dissent, while another 40% felt that the Administration's aim was to discourage dissent. The respondents clearly evidenced concern about the atmosphere in which political dissent can take place.[60] The participants opposed surveillance measures by law enforcement agencies in general, and especially by the Army.[61] Of the participants, 74% were opposed to the collection of political intelligence by Army Intelligence.[62]

The respondents opposed permitting the law enforcement agencies, on their own discretion, to collect and maintain files on groups which might engage in criminal acts of violence. However, a majority supported such efforts if a court issuing a warrant had judicially recognized that a group might engage in criminal acts.[63] In essence, the respondents felt that the maintenance and collection of investigative files was a legitimate aspect of the law enforcement agency if the scope of the files were limited by direct

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[58] *Ibid.*

[59] "Conference Report of the Transportation Institute of the AFL-CIO," from the Spring 1970 Washington D.C. Conference on "The Privacy Battlefield," published by and available from the AFL-CIO (New York: Fall 1970).

[60] *Ibid.*, 7.

[61] *Ibid.*, 3.

[62] *Ibid.*

[63] *Ibid.*, 2.

court mandate. Almost all the respondents supported the maintenance of records by law enforcement agencies about persons convicted of criminal offenses.[64]

These data indicate that opposition to collection of information on a discretionary basis is not directed to the maintenance of materials needed for organizational functioning, as long as the need is perceived as meeting a legitimate function (as the court warrant served to certify legitimacy, for example). In terms of their personal experiences with surveillance, 26% asserted that they had been photographed at political meetings or rallies, and a significant minority (16%) felt that some governmental file had been opened on their political activities. Finally, 76% would oppose law enforcement officers photographing people attending public protest meetings and rallies.[65]

Morris Janowitz has testified recently[66] about the cause of this consciousness by the public about military surveillance systems:

> . . . the scope and intensity of surveillance of civilian institutions and groups is unprecedented in American society. [467]
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> . . . it is again my reasoned judgment that [this activity by the military] raises issues about civil liberties and freedom of speech. It chills people. . . . [469]

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[64] *Ibid.*

[65] *Ibid.*, 6.

[66] See the Transcript of Proceedings Before Hon. Richard B Austin in the U. S. District Court, Northern District of Illinois Eastern Division, *A.C.L.U. et al.* v. *Westmoreland et al.*, vol. 2 December 29, 1970. Also see several books by Janowitz, including *The Professional Soldier* (1960), *The Role of the Military in th Political Development of New Nations* (1964), and *The New Mili tary* (1967). Janowitz is Chairman of the Department of Sociolog at the University of Chicago.

The public has also become aware of the unauthorized distribution of information obtained through surveillance. An example of public knowledge of misuse of information collected can be found in New York State Controller Arthur Levitt's public statement[67] that the State's Identification and Intelligence System permitted unauthorized military personnel to search its records, and gave almost unlimited access to its confidential files to any state employee in any of its 3600 user agencies.

In New York City, Investigation Commissioner Robert K. Ruskin recently suspended, with much public notoriety, a police detective on charges that he had sold confidential information from police files to banks, airlines, detective agencies and other companies.[68] Similarly, in an affidavit Police Commissioner Patrick V. Murphy of New York City acknowledged that his department had passed information, gathered by undercover police agents, about the political and protest activities of applicants for admission to the Bar to the Committee on Character and Fitness of the First and Second Judicial Departments of the Appellate Division of the State Supreme Court.[69]

Even the Justice Department in this instant case has conceded that abuses occurred in connection with the military surveillance system. Assistant Attorney General (now Mr. Justice) Rehnquist, testifying in his former capacity as an Assistant Attorney General, indicated that it would

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[67] "Levitt Says Study Shows State's Intelligence Agency, With Data on 4 Million People, Is a Peril to Rights," *New York Times*, December 13, 1971, p. 15.

[68] "City Says Detective Sold Data in Files for $10,000 Yearly," *New York Times*, May 21, 1970. For related developments, see the *New York Times*, November 23, 1970.

[69] See the *New York Times*, January 19, 1972, at p. 41: "Police Scrutiny of Radicals Rises: Murphy Discloses Increase in Secret Surveillance."

indeed be "surprising if there were not isolated examples of abuses of this investigative function." [70] The misuses which Mr. Rehnquist admitted included collection of information not legitimately related to law enforcement authority, and unauthorized dissemination of information in the surveillance files.

Mayor Joseph L. Alioto of San Francisco has publicly charged that certain confidential information, which formed the basis of a 1969 *Look* magazine article, had come illegally from the data files of six Federal agencies and two California police departments.[71]

Most recently, the Internal Revenue Service has acknowledged (under pressure of public charges by a former FBI agent) that it has a special investigative unit which collects information on political dissidents for special investigation of their returns.[72] As was nationally publicized by a story on the front page of the *New York Times*,

> . . . the IRS investigators explained they had assembled files on "antiwar people and draft-card burners and black militants." They said they were preparing to open investigations on all of them, but were just getting started and were not sure where they were going. . . .[73]

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[70] See the Ervin hearings, *op. cit.*, 602. Also, see the Newark (N. J.) *Evening News*, March 9, 1971, where the lead front page story under a four column headline announced: "U. S. Aide Admits Snooping Abuses."

[71] Ervin hearings, *op. cit.*, 492-530. See also the *New York Times*, March 4, 1971, p. 22.

[72] "I.R.S. Team Collects Data on Extremists for Tax Use," *New York Times*, January 13, 1972, pp. 1, 20. Also see the *New York Review of Books*, vol. 12, no. 1, pp. 12-18, cited *supra* in footnote 16.

[73] *New York Times*, January 13, 1972, p. 20.

Moreover, Mr. Johnnie Walker, Commissioner of Internal Revenue, said "that he did not know much about the special IRS unit's operations because the existence of the unit came to his attention only about a week ago. . . . ." [74]

There is apparently no question but that interagency use of data in one agency's files is a common practice which is not even remotely regarded by user agencies as a form of abuse and misuse. Nevertheless, it is *exactly* that in the eyes of the public. In reflection of this attitude, Representative Robert Drinan of Massachusetts has disclosed that the staff of the House Internal Security Committee has obtained from IRS the tax returns of citizens whose political activities they are reviewing and recording.[75]

The fear of misuse of information contained in files has provoked various protective moves by different groups. In academia, for example, some years ago Dean Carl W. Ackerman of the Columbia University School of Journalism announced he would no longer cooperate with federal, state or police investigators seeking information on students, except upon written request and on advice of counsel:

> Students are "tried" secretly without their knowledge and without an opportunity of explaining or defending their records before employment by any governmental agency.[76]

It is now an accepted principle of academic freedom that no lists of membership of campus organizations should be

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[74] *Ibid.*

[75] Drinan, *op. cit.*, see footnote 47 *supra*.

[76] *New York Times*, April 4, 1953.

kept by college authorities. Some schools allow graduating students the right to examine personal records and remove references to clubs and other activities.[77]

D. *Impact of Awareness*

The effects of surveillance in academia on political expression have been extensively documented. A classic sociological study, *The Academic Mind*,[78] examined the effect of the measures taken against academics during the McCarthy era on their feelings, subjective experiences, and expectations. The authors constructed an index of apprehension, which consisted of two sets of items—one pertaining to worry about security, the other pertaining to precautionary behavior.[79] The index clearly showed that certain portions of the social science community had been affected.

Herbert Kelman states that *The Academic Mind* illustrates how, by increasing the level of apprehension, the overt behavior of dissenters is inhibited.[80] He notes that those subjected to the pressures of the McCarthy years tended to "disengage themselves from legitimate activities

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[77] See, for example, the University of Minnesota "Recommendations Derived from the Admissions and Records Experience" (996); "Recommendation on Administrative Accountability" (999); "Files Policy" (999); "Policies of the Student Counseling Bureau Regarding the Release of Information About Students" (1002); and others similar, all cited in the Ervin hearings, *op. cit.*

[78] Paul F. Lazarsfeld and Wagner Thielens, *The Academic Mind* (New York: Free Press, 1958).

[79] *Ibid.*, 74.

[80] Herbert Kelman, *A Time to Speak: On Human Values and Social Research* (San Francisco: Jossey-Bass, Inc., 1968), 287. Kelman is Cabot Professor, Department of Social Relations, Harvard University.

and associations"[81] because these associations were regarded with suspicion by others.

An analogous situation exists today. The University of Minnesota is a case in point.[82] Military Intelligence began a systematic surveillance of campus activities and personnel in 1967 and this surveillance became publicly known. The fear of being surveilled, according to Malcolm Moos,[83] President of the University of Minnesota, hung like "a deadly mist"[84] over the campus community.

A necessary consequence of this high level of apprehension is the resulting change in the political actor's orientation to political phenomena. The University of Minnesota's administration is gravely worried about the effect which this surveillance has had on the quality of academic and political expression on the campus. Eugene Eidenberg,[85] assistant Vice President for Administration at the University, stressed in his report on military surveillance to President Moos that some faculty members who might privately dissent may well refuse to express this dissent publicly, for fear that the item might be recorded and later used against them.[86]

It is this fear, this apprehension created by the knowledge that extensive surveillance has occurred, which changes the quality of orientation of the actor to his political behavior. This indiscriminate surveillance "detracts

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[81] *Ibid.*, 288.

[82] See the Ervin hearings, *op. cit.*, at 531-569, 990-1021.

[83] Moos was also formerly a political science advisor to President Eisenhower.

[84] Ervin hearings, *op. cit.*, 535.

[85] Eidenberg is also a professor of political science at the University of Minnesota.

[86] Ervin hearings, *op. cit.*, 551.

from the democratic fabric of our society, destroys mutual trust, and chills"[87] the political behavior of those on *any* campus.

The apprehension is widespread through all levels of academia. In recent testimony, Jerome B. Wiesner has said that

> . . . many, many students are afraid to participate in political activities of various kinds which might attract them because of their concern about the consequences of having a record of such activities appear in a central file. They fear that at some future date, it might possibly cost them a job or at least make their clearance for a job more difficult to obtain. . . .[88]

Whether the intelligence gathering unit intends in a specific situation to stigmatize the political actor is irrelevant. The actor's fear is based on reality. Wiesner and Moos note that "they are real fears and that they frequently have caused students to back away from activities which attract them."[89] The activities to which they refer are not violent, planned confrontations or demonstrations, but rather include those activities clearly within the bounds

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[87] *Ibid.*, "Statement of the Members of the University of Minnesota Task Force on Military Surveillance," 992.

[88] Ervin hearings, *op. cit.*, 765. Wiesner is provost-elect at the Massachusetts Institute of Technology, and in the past was President Kennedy's science advisor. Moos and Wiesner reiterated this same point in a recent article by S. Kossen, "Students Fear U. S. Snooping," *News American*, March 12, 1971. Also, see Richard Flacks, *Youth and Social Change* (Chicago: Markham Publishing Co., 1971) at p. 2, where he cites the fear by students that "joining anything 'might' jeopardize the government job I'm planning to get' " or the "fear that taking any kind of stand on any issue might get you into trouble."

[89] Kossen, *op. cit.*

of what have traditionally been defined as *legitimate* political and/or academic behavior (i.e., participation in seminars or political study groups, where participants might subject governmental policies to criticism). The evidence of fear indicates that the process of redefinition has already begun to occur, so that what has been legitimate in the past is now tainted with illegitimacy because of governmental surveillance, and political participation is affected.

Blacks and other minorities have had direct experiences with surveillance. The close watch kept over Dr. Martin Luther King by the FBI and the military while he was alive, even when he was buried, and when the Poor People marched after his death—these and other similar instances have fed what some observers see as a profound fear today among Blacks of surveillance.[90]

Military surveillance of legitimate political behavior creates an apprehension on the part of actual or potential actors which arises from (1) the question of the legitimacy or illegitimacy of engaging in this behavior, and (2) the fear of misuse of the information gathered. The dis-

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[90] One account of such reactions was offered by a former member of the Army's Counterintelligence Analysis Branch. He was discussing domestic military surveillance on a TV program called "Black Talk" while before an entirely Black audience:

> "The first person to get up asked me about the existence of a plan for the genocidal extinction of blacks through the use of military forces. I was about to dismiss my questioner's fears, perhaps casually, when I realized that his question had electrified the entire audience. After trying to convince him that I believed we had no Hitlers in our military and government, the rest of the audience began expressing their fears. These people believed that the Army must have a terribly malevolent intent in collecting this information and there was no dissuading them. . . ."

See the Ervin hearings, *op. cit.*, 257-258, 275.

engagement, both behavioral and psychological, which Kelman identified in the context of the 1950s, is occurring today. Evidence cited indicates that many Americans have redefined as illegitimate or stigmatizing what is, and remains by present democratic political norms, legitimate political expression and behavior.

Even certain decisions of federally elected officials seem to be affected by the various surveillance and record-keeping systems that abound, and by the fear of misuse which arises. Many members of Congress admit privately that the dossiers maintained by the FBI and other national security agencies are a principal factor in the reluctance of their colleagues to challenge the practices and budgets of the FBI and the House Internal Security Committee (HISC). Representative Drinan, a member of HISC, has confirmed on public record that such dossiers on Congressmen do exist.[91]

Representative Abner J. Mikva of Illinois, who was himself (as was brought out in public disclosure) the subject of a political intelligence file developed by the Army, agrees with Senator Ervin that "The objection to this program is not that a U.S. Senator may have been subjected to surveillance, or that a special file was or was not kept on him. . . . The harm comes rather when the ordinary citizen feels he cannot engage in political activity without becoming a 'person of interest,' without having his name and photo placed in a file colloquially, if not officially, labeled 'subversive'."[92] But Representative Mikva continues to add,

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[91] *Congressional Record*, April 29, 1971.

[92] Ervin hearings, *op. cit.*, 89.

> . . . who can say that in future months or future congresses there will be none who will have second thoughts about a vote on military affairs? Who can be certain that his judgment will not be swayed, perhaps even unconsciously, by the belief that he is being watched? Even the possibility of surveillance raises the specter of subtle political interference. The scenario might go something like this. Those who speak out strongly in opposition to the policies of those in power are subjected to precautionary surveillance by the military. Constituents learn that their elected representative is under Army surveillance. The inference is made, either explicitly or implicitly, that he must be doing something wrong, or at least questionable, and that suspicion will be evident in the next election results. After all, who wants to be represented by a man who is so disreputable that the Army feels that the national security requires that his activities be monitored . . . it is entirely likely that some elected officials will exercise greater caution than they otherwise would in speaking their minds in order to be sure that their political future is not imperilled by a military spy.[93]

The knowledge of the consequences of surveillance leads to these "second thoughts," these unconsciously altered judgments, this "greater caution" that threatens to reduce social and political dialogue. The public's fear of surveillance is rooted in the knowledge of the costly impact it has had on the communities of scientists, entertainment figures, labor groups and workers, and Blacks, among others.

Because science has become an instrument of national policy, scientists have learned either to be cautious about their political associations, or to accept being watched as potential loyalty or security risks. A study by Walter Gell-

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[93] *Ibid.*, 137.

horn[94] of the untoward consequences of McCarthyism on scientists reported that the system of political and speech accountability had been misused to such an extent "that the atmosphere of suspicion surrounding scientists in government was an effective deterrent to procurement and use of their services."[95] Fewer scientists enlisted in public service because they felt compelled to avoid the uncertain situation where intelligence information could be misused against them.

> In the field of science, the crudities of the loyalty program discourage efforts to draw into public service the live-minded and experienced men whose talents are needed in many agencies. The distress occasioned by an unwarranted inquisition by a loyalty board is felt by a wide circle of friends and fellow-workers. Especially in the case of scientists there is a realization that even after a man has been exonerated following a hearing, he may still be subjected to a renewal of the charges and a dusting off of the same evidence if the winds of politics continue to blow strongly. . . . What [eight of America's great scientists] said publicly has been echoed privately by scientific men of every level of eminence.[96]

Political surveillance in the past has ruined careers and haunted the lives of many in the entertainment world. Private groups and public legislative bodies combined their investigative techniques against an industry which (they accused) tolerated political deviants. Under the threat of

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[94] Walter Gellhorn, *Security, Loyalty and Science* (Ithaca: Cornell University Press, 1950). Gellhorn is Professor at the Columbia University School of Law.

[95] *Ibid.*, 158.

[96] *Ibid.*, 157-158.

denunciation and boycott, the entirety of the entertainment industry in the late 1940's altered its usual course of conduct, and purged its own house of those suspected of unorthodoxy. Blacklists of all who would not cooperate with legislative inquiries were established, and many entertainers went underground or left the country. Others broke relations with their families and friends.[97] Many survived, but only by naming names and pledging to stay clear of politics. Actress Judy Holliday, testifying before the McCarran Committee in 1952 about her support of Henry Wallace for President in 1948, summed up the "greater caution" which investigated subjects feel: "I don't say 'yes' to anything now except cancer, polio, and cerebral palsy, and things like that." [98]

Surveillance was a recognized fact of life also in early union activities. Company tactics, including labor spies and informers whose authority derived from the standing threat of industry-wide blacklisting, and harassment by police and citizen front groups have in the past been employed to intimidate union organizers and other potential union members in the textile, mining and other industries. Companies threatened to close plants, to lay off workers, and even to move main plants if workers supported any "outside" agitation for unionization.[99] Use of the surveillance tech-

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[97] See the relevant literature, *supra* in footnote 1. Also, Millard Lampell, "I Think I Ought to Mention I Was Blacklisted," *New York Times*, August 21, 1966, for a personal account.

[98] *New York Post*, September 24, 1952.

[99] Abundant documentation can be found in the Senate LaFollette hearings and the more recent investigations of labor-management relations by Congress and by the National Labor Relations Board. The NLRB has interpreted corporate surveillance of worker activity in union elections and collective bargaining as intimidating and therefore the cause of injury. See, e.g., *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

nique in this situation labeled unionists as a deviant group *per se*; and discouraged (and retarded) the growth of associations which today are regarded as unquestionably legitimate.

E. *Conclusions*

The foregoing materials demonstrate that people today are indeed chilled in their political participation, in their speech, in their associations, and in their right to petition for redress of grievances, and that this chill results in large part from the system of military surveillance of legitimate civilian political activities.

To suggest, as the government does, that Plaintiffs' allegations of chill are "imaginary and speculative" is to blind oneself to truth and to deny the reality of what "all others can see and understand." *Bailey* v. *Drexel Furniture Company*, 259 U.S. 20, 37 (1922).

The societal consequence of surveillance was well described by Judge Learned Hand during the McCarthy era:

> God knows, there is risk in refusing to act till the facts are all in; but is there not greater risk in abandoning the conditions of all rational inquiry? Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where nonconformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become

so timid that we dare not enter our convictions in the open lists, to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any we dread; and they can be allayed only in so far as we refuse to proceed on suspicion and trust one another until we have tangible ground for misgiving. The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion. I did not say that these will suffice; who knows but we may be on a slope which leads down to aboriginal savagery. But of this I am sure: if we are to escape, we must not yield a foot upon demanding a fair field and an honest race to all ideas.[100]

[100] Learned Hand, *The Spirit of Liberty* (New York: Knopf, 3d ed., 1960), 216.

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Supreme Court, U. S.
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No. 71-288

In the Supreme Court of the United States

OCTOBER TERM, 1971

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ARLO TATUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents state in their answering brief (Resp. Br. 26) that "[s]tripped of technicalities, the question before the Court is whether the Army may abridge First Amendment rights by an unconstitutional program in excess of its statutory authority while remaining immune from judicial review." Having so framed the issue, they and the *amici* treat the question of justiciability as though its resolution turns on a determination by this Court of the constitutionality of the Army's civil disturbance intelligence system.

But this Court is not called upon in this case to pass on the constitutionality of the military's civilian surveillance activity; that issue was never reached below and is not presented in the petition. Nor does the case involve a claim by petitioners that the conduct of the Army in this area is "immune from judicial review." Rather, our position is that such review is inappropriate *in this case* because the allegations in respondents' complaint of February 17, 1970, do not have the concreteness and sufficiency of focus to meet the essential requirements of justiciability, and because respondents are without standing to raise the substantive claim. In short, the very "technicalities" which respondents seek to strip away are the core of this case.

1. As developed in our main brief (pp. 18-35), the complaint is cast in the most general terms. Even the majority below recognized (App. 137) that respondents "complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies." Their objection is based essentially on the claim that the mere existence of such an intelligence operation generates a chill on the exercise of First Amendment rights of persons other than respondents who wish to attend public gatherings without being observed by Army personnel.[1]

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[1] Respondents argue in their answering brief (Resp. Br. 61-66) that the Army intelligence system constitutes an

Such a claim of chill, which is not founded on any particularized government activity against these respondents or members of the class they seek to represent, fails in our view to state a justiciable case or controversy. There are no allegations here that the Army is spying on selected individuals or groups; despite the efforts of respondents and *amici* in their briefs in this Court to alter the original pleadings, no such claim is made in the complaint.[2] Instead, the

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unconstitutional invasion of privacy. But, as stated in the complaint (App. 8), this case concerns only the surveillance of "* * * peaceful political protest, demonstrations, marches, rallies, church meetings and other forms of constitutionally protected expression and assemblies * * *." The dissent below properly pointed out (App. 149-150 n. 2): "There are no allegations that the Army has conducted surveillance of wholly private activity and at oral argument [respondents] indicated, in effect, that they did not have any witnesses who would testify that the Army had engaged in such activity." Moreover, in the words of the majority below (App. 138), "[s]o far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand."

[2] In the *amici* brief filed by Unitarian Universalist Association, *et al.*, there is the suggestion (p. 8) that the Army surveillance activity was directed at particular individuals—*i.e.*, "numerous Congressmen and United States Senators and family members of a Senator, state and local officials, a member of this Court, newspaper reporters, clergymen, and thousands of other Americans." This is misleading. While names of some Congressmen, Senators, and others, do appear on the data bank print-outs and on the identification lists being retained for purposes of this litigation, this is due to the fact that such persons participated in *events* that were under surveillance. See, *e.g.*, I Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 387, 426. But that did not

entire focus of the pleadings is on the past practice of Army personnel (see pp. 10-14 *infra*) of attending and observing public gatherings, on military surveillance of "lawful and peaceful civilian political activity" (App. 8).[3] As Exhibit A to the complaint (App. 13-16) demonstrates, "spot reports" were prepared only on the *event* under surveillance. To the extent that respondents or others were identified in these reports, it was simply as a sponsor of, or speaker at, the public gathering in question, or as the one who, perhaps because of his refusal of induction, had been the reason for the demonstration; otherwise, general attendance at such gatherings was not recorded. Moreover, the record in this case makes clear that this surveillance activity was not directed exclusively at gatherings espousing any particular political viewpoint, such as, for example, opposition to the conflict in Vietnam. It extended to all public gatherings with a potential for civil disorder, irrespective of the underlying political purpose. As we explained in our main brief (pp. 31-33), the interest of the Army was "in the explosive possibilities and not in the

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make them the "subjects" of investigation, as *amici* seem to claim. Contrary to *amici's* statement, the Army has no dossiers or investigative files on any Congressman, Senator or member of this Court, except, of course, for files that relate solely to the military records of those who were in the service, or security clearance records on those who have sought access to classified defense information. See I Hearings 425; II Hearings 1299.

[3] The majority below pointed out (App. 137-138): "There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent."

merits of the colliding philosophies * * *'" (*Anderson* v. *Sills*, 56 N.J. 210, 222, 265 A. 2d 678, 684-685 (Sup. Ct. N.J.)).

Contrary to respondents' assertion, we do not contend at this time that the existence of such a military intelligence system could not possibly have had a chilling effect on some members of the public at large.[4] Just as certain individuals are in all likelihood deterred from attending demonstrations because of the potential for exposure from press and television coverage, so, too, some persons might conceivably have similar inhibitions due to the attendance at public gatherings of military personnel. But such a formalistic claim of chill, generated, in the words of the majority below (App. 139), simply by the "*present existence*" of government activity, is not enough alone to warrant judicial intervention. Such is the effect of this Court's decision in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90-91; and see *National Student Association* v. *Hershey*, 412 F. 2d 1103, 1114 (C.A. D.C.).

2. Respondents notably fail to discuss *United Public Workers* in their answering brief. Instead, as might be expected from the way in which they frame the issue, they refer to virtually every decision by this Court involving an application of the "chilling effect" doctrine. But respondents' parade of precedents only serves to obscure the real issue in this case; for by discussing cases that deal solely with the merits of

[4] Such an argument, if it is to be made, must be addressed to the question of the constitutionality of the Army's civilian intelligence program, which is not now before this Court; it has no place in the present case, dealing with the threshhold questions of justiciability and standing.

the constitutional claim, they have sidestepped the crucial threshhold questions of justiciability and standing. As we pointed out in our main brief (pp. 23-27), in all the First Amendment cases where this Court has heretofore reached the constitutional question of "chilling effect," it has been able to do so because the complaint was framed in terms of "concrete legal issues, presented in actual cases, not abstraction" (*United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 89). The decision last Term in *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154, a case which respondents note was not cited in our main brief (Resp. Br. 42), is no different. There the issue was focussed on particular questions being asked to a defined group of people—*i.e.*, "a class of law students and law graduates similarly situated, seeking or planning to seek admission to practice law in New York" (401 U.S. at 157). The Court was asked to construe specific language that was alleged to be unconstitutionally vague and overbroad.

No such precision can be found in the instant complaint. The broad claim of chill on "millions of Americans" (App. 148) rests solely on respondents' claim, as they themselves stated below (App. 151) of "a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the [Army's] civilian intelligence network" (emphasis in original). Such allegations do not present "a controversy between the parties with such immediacy and presently adversary character as to require its adjudication" (*Davis* v.

Ichord, 442 F. 2d 1207, 1211 (C.A. D.C.)). Indeed, as pointed out in our main brief (pp. 27-28), the "indefinite claims of highly visionary apprehensions" (App. 152) involved in this case are even less focussed than were the claims of chill which this Court declined to entertain last Term in *Younger* v. *Harris*, 401 U.S. 37, 42, and the related cases, decisions which respondents attempt to brush aside with but a single footnote reference (Resp. Br. 39 n. 44).

3. It would appear that respondents and *amici* believe it is possible to cure the deficiencies in the pleadings by reference to the extensive hearings on Federal Data Banks, Computers, and the Bill of Rights before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee.[5] It is, however, one thing to rely on legislative hearings to ascertain the intent of Congress with respect to a particular piece of legislation that has already been passed and requires judicial interpretation; it is quite another to import into a case volumes of testimony before a congressional subcommittee in an effort "to raise controversies not presented by the record." Cf. *Mutual Life Insurance Co.* v. *McGrew*, 188 U.S. 291, 312. Courts should be particularly circumspect in relying on legislative hearings in the latter instance, especially where, as here, the testimony in question was

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[5] The Hearings are published in two volumes, both of which have been filed with this Court as an appendix to the *amici* brief of Unitarian Universalist Association, *et al.* Volume I is referred to herein as "I Hearings"; Volume II is referred to as "II Hearings."

available to the plaintiffs at the time suit was commenced and they did not choose to rely on it in their pleadings.[6] Cf. *Mountain View Mining and Milling Co.* v. *McFadden*, 180 U.S. 533, 535.

a. Even if the Hearings were a part of the record in this case—which they are not—they would, in any event, be of little assistance to the respondents. To the extent that they are at all relevant they essentially corroborate the Statement in our main brief (pp. 3-13). As the testimony of then Assistant Secretary of Defense Froehlke[7] explains in some detail (I Hearings 375-467), the Army's domestic intelligence system that is under attack here essentially came into existence in 1965, "[i]n response to the increasing frequency and intensity of civil disorders" (I Hearings 379). When the disorders became widespread (see our main brief, p. 6, n. 6), military surveillance operations also expanded (*ibid.*):

> Through the period 1965-68, there was a crisis-oriented attitude with respect to civil disorders. During the entire period, and particularly in 1967 and 1968, heavy emphasis was placed by civilian and military officials at the highest levels of Government on improving the preparedness of the Federal Government structure, including

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[6] At least three former military agents who testified before the Senate subcommittee—Pyle, Peirce and Stein—were sources on whom respondents had relied in obtaining information to commence this suit. See App. 10, 22-43; and see I Hearings 213.

[7] In July 1971, Robert F. Froehlke was appointed Secretary of the Army.

the military, for dealing with multiple, large-scale, concurrent civil disturbances.[8]

It is in this context that one must view the Army's civil disturbance information collection plan, issued on May 2, 1968. The preamble to the collection plan makes the point quite well (I Hearings 383): "If the Army must be used to quell violence it wants to restore law and order as quickly as possible and return to its normal protective role—to do this it must know in advance as much as possible about the well-springs of violence and the heart and nerve causes of chaos." It was to this end that "spot reports" were prepared on public gatherings that portended possible civil disorder (see Exhibit A to the Complaint; App. 13-16). This intelligence information was then stored by the Army in a special civil disturbance computer data bank located at Fort Holabird, Maryland (App. 52, 55, 69).[9] And, as described in our main brief (p. 8), the names of those individuals and organizations contained in the "spot reports" were placed in a separate "identification list" (App. 54, 71; and see n. 11 in our main brief). Referring again to the preamble of the collection plan (I Hearings 383):

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[8] Even during this period, however, only "a small proportion of the total time and effort of personnel assigned to investigative and counterintelligence organizations was used for collection or processing of civil disturbance information. The great majority of investigative personnel were at all times engaged in the routine [military] personnel background investigations" (I Hearings 382).

[9] And see nn. 15 and 16 of our main brief (pp. 10-11).

> In obtaining the information called for in this plan the Army seeks only to collect that needed to exercise honest and sound judgment of the measures to be taken in suppressing rampant violence and restoring order—to assure that only the mildest effective measures are exercised—to insure that no overstepping of the degree of force or circumscription needed is applied—to conserve military resources and to avoid infringement on the responsibility and authority of civil government agencies—to insure pervasive vigilance for the fundamental rights of private citizens by the selective and enlightened use of force in restraint against those who are truly violating the rights of their fellow citizens.

b. Then Assistant Secretary Froehlke acknowledged in the congressional hearings that, during the height of civil disorders, "some people charged with responsibility in this field, especially at the local level, got a little bit too zealous in their activity" (I Hearings 430). "From the vantage point of hindsight," he stated, "the guidance and direction to the military for collection of civil disturbance information was too often general and oral rather than in written form" (I Hearings 430). But, "in December of 1968 the Army authorities began to become aware of how much information they were collecting" (I Hearings 427), and, with civil disorders subsiding in intensity, they started to reexamine their policy. Following issuance of a memorandum on February 5, 1969, by the Under Secretary of the Army, expressing concern over the scope of the Army's domestic intelligence system,

"a detailed review was made on many aspects of the civil disturbance related activities of the U.S. Army Intelligence Command" (I Hearings 393). It culminated in the following corrective measures (I Hearings 394):

> * * * the civil disturbance and biographic data bank at Fort Holabird was ordered destroyed on February 19, 1970, by the Army Assistant Chief of Staff for Intelligence. Just prior to that time, the U.S. Army Intelligence Command was directed to take a number of specific actions with reference to civil disturbance information. These included the destruction of personality lists, the discontinuance of spot reports to the Department of the Army, except those which indicated situations likely to require use of Army troops, the discontinuance of the daily civil disturbance summary to the Department of the Army, and the discontinuance of input of civil disturbance information into computer programs.

As pointed out in our main brief (pp. 10-11), these orders have now been carried out. The data bank at Fort Holabird, as well as two smaller civil disturbance computer data banks that had been established at Fort Hood, Texas, and Fort Monroe, Virginia, have been destroyed, with but a single print-out of each computer being retained for purposes of the present litigation. In addition, all copies of personality or identification lists that are known to exist, except the copies retained in connection with this suit, have been

destroyed.[10] But this is not the extent of the Army's disengagement from the type of intelligence activity here in question. We have shown in our main brief (pp. 9-11) that, by a directive issued June 9, 1970 (Pet. Br. App. B, pp. 45-51), the Army restricted its domestic intelligence operations in this area essentially to situations involving "a distinct threat of civil disturbance exceeding the law enforcement capabilities of local and state authorities * * *" (Pet. Br. App. B, p. 47). Department of Defense Directive 5200.27, issued March 1, 1971,[11] goes even farther. No longer may the Army engage in intelligence activity relating to civil disorder without "specific prior authorization of the Secretary of Defense or his designee [the Secretary of the Army]" (II Hearings 1254). Moreover, all information acquired in connection with an authorized surveillance, "regardless of when acquired, shall be destroyed within 90 days unless its retention is required by law or * * * is specifically authorized under criteria established by

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[10] While the Army cannot give definite assurance that all copies of these lists have been destroyed (see I Hearings 394), as best as can be determined the destruction is now complete. There may be, however, one or two copies of the identification lists that were circulated to local offices and, for one reason or another, not retained in the appropriate office file. If such was the case, the list might not have been destroyed as ordered. Because incomplete records were maintained with respect to the distribution of the lists, there is no way for the Army to verify that all copies have been destroyed. But, no known copies remain in existence.

[11] See II Hearings 1253-1255. And see II Hearings 1239, 1245-1246.

the Secretary of Defense or his designee" (II Hearings 1255).[12]

c. In short, as both the record in this case and the legislative hearings make abundantly clear, to whatever extent the Army had, as respondents allege in their complaint (App. 11), established a civil disturbance intelligence collection program, that program has been abolished.[13] Moreover, intelligence information gathered during the course of the Army's civil disturbance operations has either to the fullest extent possible been destroyed, or, as noted in our main brief (p. 8, n. 11) with respect to the U.S. Army Investigative Records Repository, is now being destroyed.

4. Perhaps because respondents speculate that this undisputed Army policy of disengagement from its prior civil disturbance intelligence activity may not

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[12] The relevant criteria are set forth at II Hearings 1245-1246.

[13] Much of the testimony at the legislative hearings concentrated on Army domestic intelligence operations between 1967 and June 1970, when the military directed (see Pet. Br. App. B, pp. 45-51) that civil disturbance surveillance be sharply curtailed. See generally I Hearings 100-101, 188-206, 262, 296, 308, 310, 324. As Mr. Pyle testified (I Hearings 156), "I am confident that since February 1970 there has been a substantial effort to cut this program back." And see I Hearings 206. The same point was made by Senator Ervin, Chairman of the Subcommittee on Constitutional Rights, in colloquy with then Assistant Secretary Froehlke (I Hearings 430): "I am frankly not looking for a culprit but I want to make it certain that these things don't happen in the future, and I would have to say I think you all have taken some very significant steps looking to that same means and I certainly commend you for it."

have been fully implemented—a conjecture without support in this record or in the legislative hearings—the case cannot be considered technically moot at this stage of the litigation. But there still remains a question of equity jurisdiction. When parties come before the courts seeking equitable relief by way of an injunction, they "must satisfy the court that relief is needed" (*United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633). Accordingly, the fact that the challenged activity has abated is relevant to the determination whether the suit remains one appropriate for equitable relief. It is not the usual practice of courts of equity to enjoin conduct which has already been terminated, when there is no real threat that it will be resumed. Compare *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, No. 70-61, this Term, decided January 10, 1972. In the absence of "some cognizable danger of recurrent violation; something more than the mere possibility which serves to keep the case alive" (*United States* v. *W. T. Grant Co.*, *supra*, 345 U.S. at 633); the dismissal of an action for extraordinary injunctive relief is well within the discretionary power of the courts. And this is especially so when the complaint fails to speak in terms of a clearly defined controversy between parties asserting specific, identifiable and conflicting interests capable of adjudication in an adversary context (see *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 90-91).

We have already pointed out (Pet. Br. 27-35) that the Constitution confines the exercise of judicial power to "Cases" and "Controversies." As stated in our main brief (p. 23), "Federal courts have not been given a roving commission to inquire generally into activities of the two other Branches of the Government." If, as respondents have alleged, the Army, in performing its civil disturbance intelligence function during the outbreak of widespread civil disorders in the late 1960's, exceeded the authority granted to it by Congress to carry out its civil disturbance mission—but see our main brief at pp. 30-33—that is a matter with which the Legislative Branch is particularly well suited to deal. It is in that forum, rather than in the courts, where, under the "separation of powers" prescribed by the Constitution, generalized grievances of the sort involved here are to be aired by the public. Resolution of such "broad questions of both law and policy" is, in the words of the dissent below, "much better undertaken, at this juncture, by the Congress * * *." And, in the absence of a clearly defined controversy presented by persons who assert a specific, identifiable, and distinct injury to themselves, there is no need for the federal courts, further removed from the "impact of actuality" (App. 154 n. 5), to duplicate that effort. Compare *Baker* v. *Carr*, 369 U.S. 186, 217.

5. Moreover, as developed in our main brief (pp. 35-42), respondents lack standing to request adjudication of the constitutional issues raised. Their as-

sertion that the question of standing is not properly before this Court is not well taken.

In petitioners' motion to dismiss in the district court (App. 73), it was argued "that there exists no justiciable issue, case or controversy and no basis for the granting of equitable, declaratory or other relief * * *". Of course, as this Court stated in *Flast* v. *Cohen*, 392 U.S. 83, 98, "[s]tanding is an aspect of justiciability." The district court specifically recognized this in its dismissal order, ruling that respondents "show no threats to their rights and present no justiciable controversy" (App. 128).

The standing question was raised again in the court of appeals. There, we noted in our brief (C.A. Br. p. 20 n. 20) respondents' assertion that they "are not people, obviously, who are cowed and chilled * * *," and suggested that they, "therefore, have no standing to complain," citing *Baker* v. *Carr*, 369 U.S. 186, 204, and *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241. The court of appeals divided on the merits of that contention (compare App. 140 n. 17 with App. 148-149); however, neither the majority nor the dissent below indicated that the question of standing had not been presented to the court.

In this Court, we once more challenged respondents' standing to maintain this suit in our petition for a writ of certiorari (pp. 8-12).[14] There is thus no basis to the claim that the question of standing is not now properly before this Court. As for respond-

[14] Respondents' opposition to the petition (pp. 24-30) argued the standing question only on its merits.

ents' other arguments on this point, they are fully answered in our main brief (pp. 35-42), and we see no need to repeat them here.[15]

CONCLUSION

For the reasons stated here and in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and respondents' complaint should be dismissed.

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MARCH 1972.

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[15] We note that respondents seek to add a new dimension to their standing argument based on a claim of abridgment of associational rights "because the implementation of the Army's policy has inhibited others interested in their political cause from associating with them" (Resp. Br. 84). But the complaint in this case does not allege Army intelligence activity directed against any particular group or organization. This is not a suit like *NAACP* v. *Alabama*, 357 U.S. 449, for example, where an organization is suing on behalf of its members; the First Amendment claim of injury to "associational ties," as such, is not involved here. Rather, respondents come into court, as pointed out in our main brief (pp. 36-37), as self-appointed "private attorneys general" acting on behalf of "millions of Americans" who allegedly are inhibited from "associating" with others—not necessarily respondents—at public gatherings because of the alleged existence of Army civil disturbance intelligence operations. But, respondents readily assert that they "are not people, obviously, who are cowed and chilled * * *" (App. 148). Accordingly, they are without standing to maintain this suit.

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OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO WITHDRAW OPINION OF THE COURT AND MOTION TO RECUSE MR. JUSTICE REHNQUIST *NUNC PRO TUNC*

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO WITHDRAW OPINION OF THE COURT

Respondents respectfully move this Court for an order withdrawing its opinion in *Laird* v. *Tatum,* No. 71-288, filed on June 26, 1972. Such an order will facilitate the consideration by Mr. Justice Rehnquist of the attached motion to recuse him *nunc pro tunc* from participating in the Court's deliberation and decision in this case. If Mr. Justice Rehnquist does recuse himself, respondents suggest it would then be appropriate for the Court to vote again on the case and take whatever subsequent measures are dictated by the result of the new vote. If Mr. Justice Rehnquist does not recuse himself, the opinion can be reinstated, subject, of course, to whatever disposition the Court may make of respondents' Petition for Rehearing on the merits of the case, which has been separately filed.

IN THE

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—v.—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO RECUSE MR. JUSTICE REHNQUIST *NUNC PRO TUNC*

To the Honorable William Rehnquist, Associate Justice of the United States:

Respondents respectfully move that Mr. Justice Rehnquist recuse himself *nunc pro tunc* from participating in the Court's deliberation and decision in *Laird* v. *Tatum*, No. 71-288, decided June 26, 1972.

The principal ground for this motion is the federal statute governing the disqualification of justices and judges, 28 United States Code, section 455, which reads in pertinent part as follows:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, [or] is or has been a material witness. . . .

A further ground for the motion is the Final Draft of the Code of Judicial Conduct (May 1972) prepared by the Special Committee on Standards of Judicial Conduct of the American Bar Association, which reflects in detail the considerations underlying the disqualification statute, and provides as follows in Canons 2-A and 3-C(1)(a) and (b):

> Canon 2. *A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.*
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> Canon 3. *A Judge Should Perform the Duties of His Office Impartially and Diligently.*
>
> . . . . . .
>
> C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

The question presented to the Supreme Court in *Laird* v. *Tatum* was "[w]hether the Court of Appeals was correct in holding that respondents' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity is an unconstitutional burden on [respondents'] exercise of their First Amendment rights—was justiciable under Article III" [Brief for Respondents, at 1]. In an opinion by the Chief Justice, and by vote of 5-4, the Court held that "allegations of a subjective 'chill' are not a substitute for a claim of specific present objective harm or a threat of specific future harm" [Slip Op., at 12-13]. Mr. Justice Rehnquist voted with the majority and joined in its opinion.

I.

Prior to his nomination and confirmation as an Associate Justice of the Supreme Court, Mr. Justice Rehnquist served as an Assistant Attorney General in the Office of Legal Counsel. During his tenure in that office he was called upon or chose to act as "a Justice Department spokesman"[1] on the question of the constitutionality of governmental surveillance in particular factual settings. In such capacity,

[1] Testimony of William H. Rehnquist, Hearings before the Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess., on Nominations of William H. Rehnquist and Lewis F. Powell, Jr. to be Associate Justices of the Supreme Court of the United States [hereafter "Confirmation Hearings"], at 185.

Assistant Attorney General Rehnquist appeared twice as a witness in hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary[2] to testify about the surveillance practices of the United States Army, and other agencies of government.

Repeatedly during his testimony in the Senate hearings on March 9 and March 17, 1971, Assistant Attorney General Rehnquist stated in response to questions from members of the subcommittee that he did not agree that "there are any serious constitutional problems with respect to collecting data on or keeping under surveillance persons who are merely exercising their rights of peaceful assembly or petition to redress a grievance."[3] The witness' testimony was by no means confined to such general statements; the concrete factual setting which he chose to discuss was the surveillance of civilians by the United States Army as depicted in the pleadings and the District Court decision in *Tatum* v. *Laird*, the very lawsuit brought by the respondents herein. Not only did the witness display a special and intimate knowledge of facts concerning the case based upon his possession of documentary evidence which has never been made available to the respondents,[4] but he also tes-

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[2] *Federal Data Banks, Computers, and the Bill of Rights*, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess., March 9 and 17, 1971 [hereafter, "Ervin Hearings"].

[3] Ervin Hearings, Vol. 2, at 620. See also *Id.*, at 601-04, 617-22, 861-67.

[4] The core of the evidence offered for proof by the plaintiffs was a section of a computer printout of Army intelligence information describing the constitutionally protected political activities of the plaintiffs and others similarly situated, appended to the Complaint as Exhibit A (Appendix, at 14-17).

In his testimony and in correspondence with the chairman of the subcommittee, the witness indicated that following the institution

tified in considerable detail, in response to a question by Senator Ervin, why in his view the case was not justiciable:

> Senator Ervin. But you do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their first amendment rights even though such action will tend to discourage people in the exercise of those rights?
>
> Mr. Rehnquist. Well, to say that I say they can do it sounds either like I am advocating they do it or that Congress has authorized it, none of which propositions do I agree with.
>
> My point of disagreement with you is to say whether as in the case of *Tatum* v. *Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.[5]

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of this lawsuit, all but one copy of the entire printout alleged as the evidentiary basis for the suit were destroyed, and the one remaining copy was placed in the physical custody of the witness. Ervin Hearings, vol. I, at 601-602, 622; vol. II, at 1369-70. See also Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 92nd Cong., 1st Session on S.1125, at 407 (letter to Senator Ervin from J. Fred Buzhardt, General Counsel, Department of Defense, March 19, 1971).

The witness did not confine his comments on the evidence to his role as custodian of the printout. Apparently in response to allegations made by the plaintiffs and others that the Army's intelligence data on civilians had been disseminated to other agencies of government, the witness testified that "[n]o information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base." Ervin Hearings, vol. I, at 601.

[5] *Id.*, vol. I, at 864-65.

Nor did Assistant Attorney General Rehnquist confine his comments on Army surveillance and the justiciability of *Laird* v. *Tatum* to his oral testimony before the Ervin Subcommittee. He also appeared in other public forums to express his views about these subjects. On March 19, 1971, for example, he delivered a speech to the National Conference of Law Reviews in Williamsburg, Virginia, in which he stated that "no legitimate interest of any segment of our population would be served by permitting individuals or groups of individuals to prevent by judicial action, the government's gathering of information. . . . I have previously stated my belief that the First Amendment does not prohibit even foolish and unauthorized information gathering by the government."[6] The Assistant Attorney General made similar comments on the justiciability of court challenges to governmental surveillance at meetings of the Maricopa County, Arizona Bar Association on March 15, 1971,[7] and the American Bar Association on July 15, 1971.[8]

Finally, on September 20, 1971, Assistant Attorney General Rehnquist submitted to the Ervin Subcommittee a memorandum of law in response to a request by Senator Hruska for an interpretation of Supreme Court cases cited by a previous witness to support the proposition that Army

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[6] "Privacy, Surveillance, and the Law," speech reprinted in Ervin Hearings, vol. II, at 1593, 1595.

[7] "Curbs on Investigators Called Serious Mistake," *Arizona Republic*, March 16, 1971.

[8] "Law Enforcement and Privacy," remarks of William H. Rehnquist, Assistant Attorney General, office of Legal Counsel, at the American Bar Association Convention, Sonesta Tower Hotel, London, England, July 15, 1971, at pp. 12-13.

surveillance activities are unconstitutional.[9] The Rehnquist memorandum not only presented the argument that Army surveillance was not unconstitutional under any case decided by the Supreme Court, but also offered the following comment on the allegations made by the respondents herein:

> Recent experience seems to establish that, even if the strongest allegations concerning Army data-gathering are assumed to be true, there has been no interruption in 'uninhibited, robust, and wide open' debate on major controversial issues. (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Both the Veterans' demonstration and the later May Day demonstration seem to substantiate that. If anything, the now-terminated data-gathering functions of the Army seem to have stimulated rather than curtailed debate. . . . Indeed, it may be that repeated assertions of such government information gathering activity do more to inculcate paranoia in the general populace than the actual gathering of information itself.[10]

In the Senate hearings on his nomination as an Associate Justice of the Supreme Court, Assistant Attorney General Rehnquist was questioned on several occasions about his prior public statements and testimony concerning Army surveillance. In each instance the nominee responded either by reaffirming his view that such surveillance is not

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[9] The previous witness was Alexander Polikoff, attorney for the plaintiffs in *ACLU* v. *Westmoreland*, 70 Civ. 3191 (N.D. Ill. 1970), affirmed sub nom. *ACLU* v. *Laird*, 71-1159 (7th Cir. May 23, 1972), a case involving a challenge to Army surveillance practices similar to the case at bar. Mr. Polikoff's testimony presented the legal argument made in both cases. Ervin Hearings, vol. I, at 91-100.

[10] Ervin Hearings, vol. II, at 1408-09.

unconstitutional,[11] or by indicating that it would be improper for him to comment on issues in which he had been involved as Assistant Attorney General because of his "lawyer-client relationship" with the President and the Attorney General.[12] At the time of these confirmation hearings the Petition for Certiorari in *Laird* v. *Tatum* was pending in the Supreme Court.[13]

II.

Respondents do not, of course, question Mr. Justice Rehnquist's good faith in expressing his views on the constitutional issues presented by this case prior to his nomination and in adhering to those views in the Senate confirmation hearings. Indeed, it was precisely because of the clarity and finality of his testimonial views and the intimacy of his knowledge of the evidentiary facts at issue in this case that the respondents were convinced that Mr. Justice Rehnquist would not participate in the Court's deliberation and decision, and thus are now constrained to move to disqualify him *nunc pro tunc* for participating improperly. This motion is not made lightly, but only after careful consideration by counsel and their colleagues in full knowledge of its unprecedented nature.[14]

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[11] Confirmation Hearings, at 66-67, 185-86, 489. Although the nominee indicated that he "was speaking for the Department [of Justice]" in his statement before the Ervin Subcommittee, he would "stand by that statement" in the Confirmation hearings. *Id.* at 66.

[12] Confirmation Hearings, at 34, 48-49, 171-76.

[13] Petition for Certiorari filed on August 25, 1971.

[14] In *Jewell Ridge Coal Corporation* v. *Local No. 6167, United Mine Workers of America*, 325 U.S. 897 (1945), the only other reported instance where the issue of disqualification was raised by a party in a Supreme Court case, a petition for rehearing on the

The disqualification provisions of 18 U.S.C., section 455 are mandatory upon a justice or judge who has "a substantial interest," has "been of counsel" or "has been a material witness" in connection with any proceeding before him. Indeed, the statute is bottomed on a fundamental principle of procedural due process frequently applied by this Court: "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison,* 349 U.S. 131, 136 (1954). The stringency of this rule "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 99 L. Ed. 11, 75 S.Ct. 11." *Id.,* at 136. See also *Commonwealth Coatings Corporation* v. *Continental Casualty Company,* 393 U.S. 145, 148 (1968) ("any tribunal permitted by law to try cases or controversies not only must be unbiased, but also must avoid the appearance of bias"); cf. *Tumey* v. *Ohio,* 273 U.S. 510 (1927).

The mandatory provisions of the disqualification statute have been frequently recognized by lower federal courts under circumstances similar to those of Mr. Justice Rehnquist in the case at bar. In *Roberson* v. *United States,* 249 F.2d 737, 741 (5th Cir. 1957), *cert. denied,* 356 U.S. 919 (1958) the statute was construed to require disqualification if a judge has "a prior knowledge of the facts or prior interest in an issue arising out of them." Similarly, in *United*

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ground that a justice had improperly participated was denied because "the complaint is one which cannot properly be addressed to the Court as a whole. . . ." (Jackson, J., concurring). This decision was reached three years before the enactment of the disqualification statute upon which the instant motion is based.

States v. *Vasilick,* 160 F.2d 631, 632 (3rd Cir. 1947), it was held that a district judge who was a district attorney when a criminal defendant was tried and convicted in his jurisdiction should have disqualified himself from a motion to vacate the sentence. The Court of Appeals pointed out that "[i]n reaching this conclusion we desire to make it abundantly clear that we entertain no doubt of the fairness or impartiality of the District Judge." *Id.* at 632. See also *United States* v. *Maher,* 88 F.Supp. 1007 (D. Maine 1950) (former United States Attorney must disqualify himself as judge in any case arising during his tenure as United States Attorney). Furthermore, the "interest" contemplated by the statute has, in the case of former government attorneys, been construed to mean "the interest that any lawyer has in pushing his case to a successful conclusion." *United States* v. *Adams;* 302 F.2d 307, 310 (5th Cir. 1962).

The reason for such stringent application of the disqualification statute in the case of judges who have been publicly associated prior to their judicial appointment with one side of a case pending before them was stated by the Sixth Circuit Court of Appeals in *United States* v. *Amerine,* 411 F.2d 1130, 1133 (6th Cir. 1969):

> We believe that the language employed by Congress [in 18 U.S.C. Section 455] compels the conclusion that Congress was concerned with avoiding the *appearance* of partiality as well as avoiding the fact. See *Rapp* v. *Van Dusen,* 850 F.2d 806 (3rd Cir. 1965); *Texaco, Inc.* v. *Chandler,* 354 F.2d 655 (10th Cir. 1965). See also *American Cyanamid Co.* v. *FTL,* 363 F.2d 757, 763-68 (6th Cir. 1966) [emphasis in original].

This interpretation of the statute is also reflected in a memorandum, "Disqualification of Supreme Court Justices because of a prior participation in a case as a Government

attorney or official," prepared for Mr. Justice White by the Office of Legal Counsel at the time of his nomination as an Associate Justice.[15] Citing *Roberson, supra,* the memorandum at pp. 2-3 pointed out that prior knowledge of the facts in a case or a prior interest in an issue arising out of them are grounds for statutory disqualification of a sitting justice. Under circumstances where a former Justice Department official has had more than "a mere pro forma relationship" with a case, therefore, disqualification would be required.[16]

Former government lawyers and officials are similarly entreated by the Commentary to Canon 3C(1)(a) and (b), *supra,* of the 1972 Draft Code of Judicial Conduct: "a judge formerly employed by a governmental agency . . . should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." Under the circumstances of the instant case, Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allega-

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[15] The memorandum is on file with the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee. At p. 49 of the Confirmation Hearings Mr. Justice Rehnquist testified that he would consider himself to be bound by the standards enunciated in the memorandum if his nomination were confirmed.

[16] Justice Department memorandum, at 4-5. The memorandum cites two notable examples in Justice Jackson's disqualification in *Schneiderman* v. *United States,* 320 U.S. 118, 207 (1942), a case instituted during his tenure as Attorney General, and Chief Justice Stone's disqualification "in the *Aluminum Company* case because it seemed to him that his connection with it as Attorney General was 'so intimate' for a time that it was 'distinctly undesirable' that he should assume to sit in it." *Id.* at 5. See also Frank, *Disqualification of Judges,* 56 Yale L.J. 605 (1947).

tions, and because of his public statements about the lack of merit in respondents' claims.[17] For these reasons Mr. Justice Rehnquist has displayed an interest and involvement in the case sufficient to warrant his disqualification *nunc pro tunc* from the deliberation and decision of the Court.

Respectfully submitted,

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[17] "Justice Douglas, in his view of the requirements of 28 U.S.C. 455, according to his counsel has disqualified himself in the following cases:

* * * * *

(2) In cases involving parties or matters about which he has publicly spoken so as to place his impartialty in doubt. See, e.g., *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955); *County of Santa Barbara* v. *Molley*, 396 U.S. 950 (1969)." Final Report by the Special Subcommittee on H. Res. 920 of the Committee on the Judiciary, House of Representatives, 91st Cong., 2nd Sess., at 42-43.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN R. LAIRD, Secretary of Defense, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

1. The opinion in this case overlooked a fundamental aspect of the pleadings and therefore came to an erroneous conclusion.

The opinion by the Chief Justice is written on the assumption that the only injury alleged by respondents was the chill imposed upon their First Amendment rights by the Army's surveillance program (Slip Op., p. 9). Proceeding from that assumption, the opinion holds that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; . . . " (Slip Op., pp. 12-13).

That assumption, however, is wrong, for the fact is that respondents' complaint alleged, and their brief before the Court stressed, the existence of the specific harm said to be absent.

In addition to the chilling effect allegation set out separately in paragraph 16 of the complaint (App. 10-11), paragraph 15 of the complaint (App. 10) alleged that

> 15. The purpose and effect of the collection, maintenance and distribution of the information on civilian political activity described herein is to harass and intimidate plaintiffs and others similarly situated and to deter them from exercising their rights of political expression, protest and dissent from government policies which are protected by the First Amendment *by invading their privacy, damaging their reputations, adversely affecting their employment and their opportunities for employment, and in other ways* [emphasis supplied].

Paragraph 17 of the complaint (App. 11) alleged that

> 17. The conduct of the defendants described herein *deprives plaintiffs* and persons similarly situated *of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy guaranteed and protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States,* and deprives all Americans of basic First Amendment rights by inhibiting and curtailing free and open discussion of issues of public importance [emphasis supplied].

These allegations of specific harm were repeatedly stressed in respondents' brief at pp. 7-8, 9-10, 31-32, 35, 37-38, 43, 61-66 and 81-82.

The "specific present objective harm" alleged by respondents involves more than injury to First Amendment rights. Indeed, at pp. 81-82 of their brief, respondents reminded the Court that even under "the stricter rules of standing that apply to constitutional cases arising *outside* the First Amendment area, [they] would nevertheless have standing to sue because they have alleged 'that the challenged action has caused [them] injury in fact, economic or otherwise . . .' *Association of Data Processing Service Organization, Inc.* v. *Camp,* 397 U.S. at 152-53."

Notwithstanding these clear and unambiguous assertions of specific harm, both to First Amendment and non-First Amendment interests, the opinion of the Chief Justice makes no reference to them whatsoever and treats the case as if it involved only an "abstract" claim of chilling effect. The opinion's reliance upon *Ex Parte Levitt,* 302 U.S. 633 (1937) and *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), necessarily assumes that respondents are mere intermeddlers and their claims hypothetical, but they are in fact subjects of surveillance[1] and they allege that their injury is actual and specific. Indeed, the real basis for the majority's conclusion is that respondents' allegations are not sufficiently developed, but this is a result of the District Court's refusal to allow an evidentiary hearing.

By omitting to acknowledge the existence in this case of claims of specific harm—alleged in the complaint and stressed in the brief—the majority has fatally deformed the foundation upon which its opinion rests.

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[1] Paragraph 10 of the complaint (App. 9) alleges "specific action of the Army against them" and Exhibit A of the complaint (App. 13-21) describes how respondents' activities were monitored by the Army.

2. Even if the allegations of specific harm are for some inexplicable reason to be ignored, the opinion by the Chief Justice rests on facts asserted by petitioners, denied by respondents, and unresolved by trial.

In the present posture of the case—dismissal of the complaint under Rule 12(b)(6) for failure to state a claim—all facts asserted by the complaint must be taken as true and all facts asserted by the defendants must be disregarded.[2] Proper acceptance of the allegations in the complaint emphasizes the claim persistently put forward by respondents in their brief (pp. 19, 23, 31-33, 60, 91, 92) that the case must be remanded for a trial on the issues of fact. Neither the District Court nor the majority opinion, however, properly excluded contested fact matters in considering the sufficiency of the complaint.

There are five assertions of fact recited in the opinion of the Chief Justice to support his conclusion that injury to the respondents is too remote and speculative to satisfy the principles of justiciability. Each of these items is recited as "fact", but they are all contested allegations not yet proven in the crucible of trial, or mere speculations wholly without basis in any of the pleadings.

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[2] The facts asserted by the defendants in the affidavit of Thaddeus R. Beal, dated March 19, 1970, were put forward solely in support of their Opposition to Plaintiffs' Motion for a Preliminary Injunction (App. 73) and cannot be taken as true on their motion to dismiss the complaint. "In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered." *Land* v. *Dollar*, 330 U.S. 731, 735 (1947). The principle that in determining the sufficiency of the complaint under Rule 12(b)(6) the District Court was bound to exclude all fact allegations outside the complaint was fully described in respondents' brief, pp. 8 and 9, notes 10 and 11.

a. The majority opinion asserts that "[t]he [surveillance] system . . . consisted essentially of the collection of information about public activities that were thought to have some potential for civil disorder" (Slip Op., p. 5).

Former intelligence analysts from the Army's Counterintelligence Analysis Branch (CIAB) in Washington, D.C. are prepared to testify on behalf of respondents that reports on public activities likely to develop into civil disorders requiring military action constituted a tiny portion of all the reports they received in performing their duties from 1967 to 1972. Fifteen former agents from various sections of the United States would testify that their units conducted an indiscriminate surveillance by direct agent observation of virtually all demonstrations involving twenty or more demonstrators, regardless of the potential for violence.

Former Army undercover agents are prepared to testify that they personally infiltrated private meetings of antiwar groups. Agents assigned to college campuses would testify that they obtained access to confidential student files. Documents will prove that Army intelligence agents infiltrated classrooms to monitor what was being taught. Army intelligence coordinators (clerks) would explain how they maintained extensive card files, dossiers, and photographs of civilians who were not associated with the armed forces and who had done nothing to indicate that they intended to incite, agitate, or precipitate violence. These witnesses would testify that Army intelligence assumed the right to monitor all civilian political activity in the United States, no matter how lawful and peaceful, and did not inquire into its legal authority to do so.

Examination of the computer print-outs and publications now being preserved for this litigation will confirm this testimony. They will reveal that computerized data centers at Fort Holabird, Fort Hood, Fort Monroe, and McDill Air Force Base independently developed the capability of producing round-up lists of political protesters. These files will also reveal that Army intelligence maintained extensive records on the finances, psychiatric records, and sex lives of civilians who posed no threat to military security or civil order.

In addition, respondents can prove that reports on lawful political activity were taken from the Intelligence Command's highly inaccurate civil disturbance wire service and filed in the dossiers of persons who had held, were holding, or were being considered for security clearances, thus contaminating what are supposed to be investigative reports with unverified rumor and gossip.

Finally, respondents are prepared to show that the collection of information on the political activities of individuals and organizations not only was intended to carry out an unauthorized and unwarranted interpretation of the Army's civil disturbance mission, but also was used to compile voluminous "subversives files" which could cost respondents and members of respondent organizations positions with the federal government and defense industry.

b. The Chief Justice finds it "significant that the principal sources of information" contained within the Army's computer data bank "were the news media and publications in general circulation" (Slip Op., p. 5). There is no authority given for this statement and there is no such

fact in the record before the Court. On the contrary, the complaint alleges at paragraph 8 that the information "was acquired by defendants' agents' surveillance . . . , by anonymous informants, and through the use of photographic and electronic equipment."

Analysis of the Continental Army Command's computerized incident data bank will reveal that only five percent of that collection agency's incident reports came from the news media. Former analysts at CIAB, the principal users of domestic intelligence within the Army, will testify that most of the reports they received were official documents not "in general circulation." Documents will prove that fully one-third of all spot reports generated by the Army Intelligence Command during the spring of 1969 were based on direct agent observation. At that time, spot reports were running at the rate of 1,200 a month.

Witnesses also will testify that other sources of CONUS intelligence included undercover agents, informants, confidential student files, credit union files, and bank records. In addition, documents will prove the use of electronic equipment in violation of Section 605 of the Federal Communications Act of 1934, as interpreted by both the Department of Justice and the Army's Judge Advocate General:

c. The majority concluded that "the total intelligence operation concerned with potential civil disorders hardly merits description as 'massive'" (Slip Op., p. 6). The opinion states, for example, that ninety-four percent of the time of the approximately 1,000 Army agents involved in domestic intelligence operations is devoted to security investigations of the Army's civilian employees and contractors' employees (Slip Op., pp. 5-6 and n. 4). This

"fact" is apparently adopted from the February 25, 1970 letter of the Army General Counsel Robert Jordan (App. 52) which was submitted by plaintiffs in support of their motion for a temporary restraining order. But the impropriety of accepting Mr. Jordan's claims as established fact is emphasized by his subsequent admission that he had been misled by military personnel about the scope of the Army's domestic intelligence program, and did not learn the true facts until he visited Fort Holabird with Assistant Secretary of the Army Beal in June 1970. See Ervin Hearings, Vol. 1, p. 462. This subsequent information would, of course, be elicited at trial and the broad scope of the Army's program, beyond security investigations, would be proved.

No term but "massive" can possibly describe the scope of the Army's surveillance and files. Plaintiffs are prepared to prove that the Army maintained over 350 separate records centers on civilian political activity. Documents will show that at least five of these data centers employed computers to store information on individuals, organizations, and incidents, and that one used a computer to index its microfilm archive.

Respondents also can show that these data banks contained files on hundreds of thousands of law-abiding citizens. Government inventories of non-computerized data holdings will be introduced to prove that some of the CONUS armies maintained files on more civilians than some of the centralized computerized data banks. Thus inventories will show that Fourth Army headquarters at Fort Sam Houston, Texas, maintained over 120,000 "locator cards" on individuals and organizations. Other inventories will show that the Intelligence Command main-

tained—and continues to maintain—211,243 dossiers on organizations and 80,731 files on individuals. These files are in addition to the approximately seven to nine million security clearance dossiers which have been contaminated with CONUS intelligence reports and the computer data bank which has been ordered destroyed.

d. The opinion asserts that the "blacklist" and the records in the Fort Holabird data bank "were found to be unnecessary and were destroyed" by the Army (Slip Op., p. 6). No authority is cited for the statement; it was apparently adopted from the affidavit of Under Secretary of the Army Beal submitted in support of defendants' motion to dismiss (App. 69-73).[3]

But the Holabird computer bank was only one of many data repositories maintained by defendants (see Brief for respondents, pp. 13-14) and the "blacklist" was only one means of circulation of that data which respondents had cited. Thus, the opinion, by crediting as a significant fact Secretary Beal's claims regarding the Holabird data bank and the "blacklist", while ignoring the parallel surveillance apparatus which he failed to discuss in his affidavit, leads to the false conclusion that respondents' grievances have been fully redressed.

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[3] Orders to destroy the Fort Holabird data bank were issued on February 19, 1970. Respondents can prove, however, that on July 10, 1970 it was discovered that the entire data bank could be reconstituted. Later an "inactive tape" was discovered and ordered destroyed on October 17, 1970. These and other evasions prompted the Army General Counsel to order an Inspector General's investigation of the entire Army Intelligence Command during the fall of 1970. This investigation determined, among other things not then known to the respondents, that spot reports ordered destroyed on March 9, 1970 and again during June and July 1970 were still in existence at Intelligence Command headquarters in December 1970.

Respondents can prove that as of August 26, 1970, certificates of destruction had been received for only 46% of the blacklists which had been ordered destroyed on February 18, 1970. Given the pattern of evasion of the cutback orders documented in the Ervin Hearings, at pp. 156, 157-59, 160, 162, 281, 331, and 462, respondents submit that it would be proper to conclude that less than 46% of the blacklists were actually destroyed.

e. Finally, the opinion unquestioningly accepts the Army's self-serving directives and declarations, contained in "briefs for petitioners filed with this Court," that its domestic intelligence activities have been "significantly reduced" (Slip Op., p. 7). The respondents, however, devoted an entire section of their brief (pp. 88-91) in anticipation of the suggestion that the Army's program had been dismantled, and explicitly stated that "they could show at trial that a substantial portion of the apparatus, and the information which it has collected, is still in existence" (Brief for Respondents, p. 89). Nonetheless, the opinion accepts the Army's unilateral version of the facts.

In addition to the Army's failure to destroy its blacklists and data banks, the respondents can show through the testimony of former agents still other evasions of the directives which the Court's opinion assumed to have been obeyed. One undercover agent would testify that he was ordered to continue his infiltration of an anti-war group for months after the June 9, 1970 cease-and-desist order. Respondents can also show that this and other infiltrations violated the McGiffert and Beal memorandums of February 5, 1969 and April 24, 1969 respectively, in that the infiltrations were undertaken without prior authorization from the Under Secretary of the Army.

Accordingly, respondents respectfully submit that they can disprove each of the five factual assertions on which this Court's characterization of the Army's surveillance program and conclusion as to its effect are based.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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Counsel for respondents gratefully acknowledge the assistance of Mr. Christopher H. Pyle, former captain, United States Army Intelligence Command, in the preparation of this petition.

Certificate of Counsel.

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

.....

Counsel for Petitioners

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* TATUM ET AL.

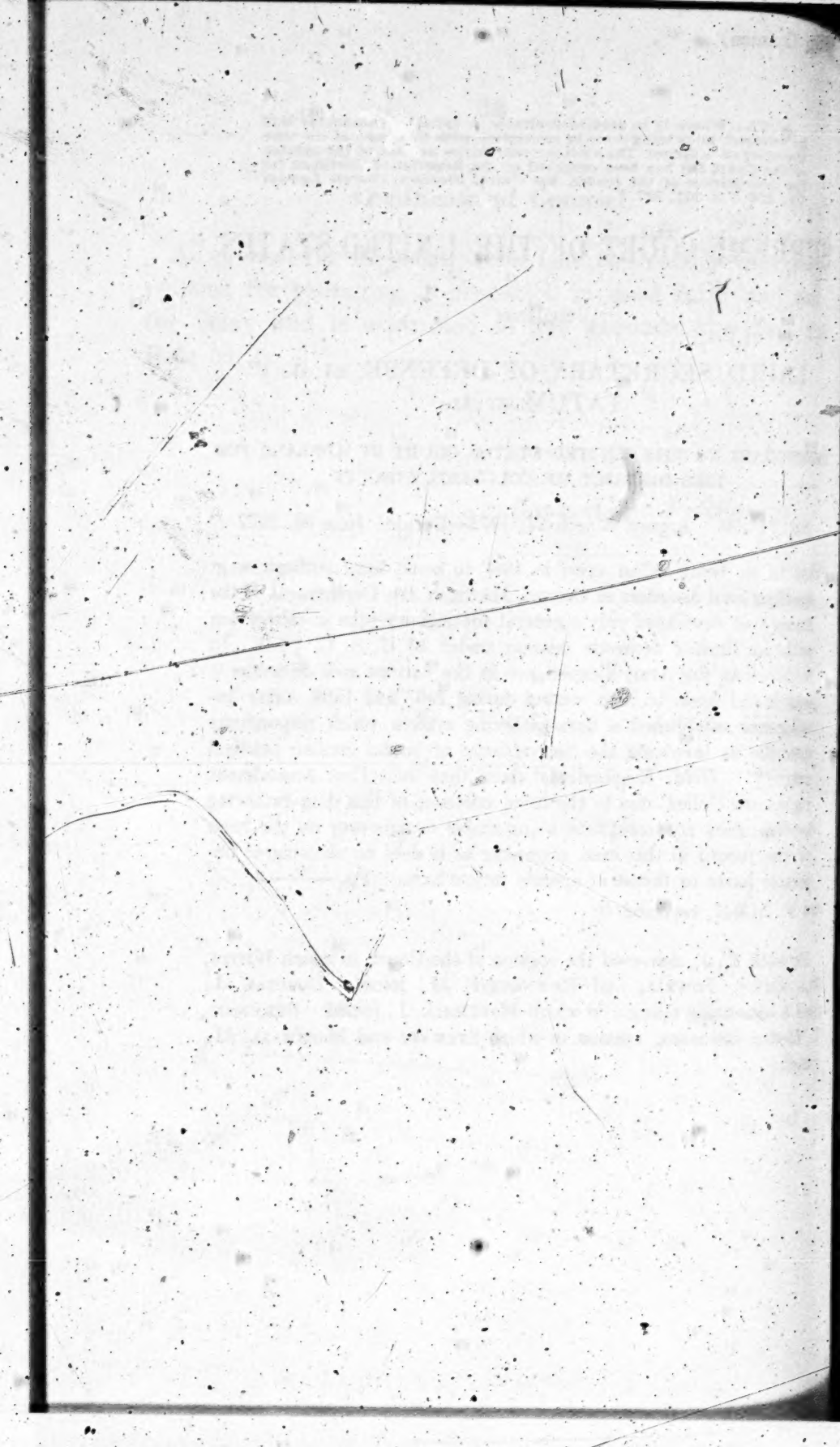
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-288. Argued March 27, 1972—Decided June 26, 1972

Prior to its being called upon in 1967 to assist local authorities in quelling civil disorders in Detroit, Michigan, the Department of the Army had developed only a general contingency plan in connection with its limited domestic mission under 10 U. S. C. § 331. In response to the Army's experience in the various civil disorders it was called upon to help control during 1967 and 1968, Army Intelligence established a data-gathering system which respondents describe as involving the "surveillance of lawful civilian political activity." *Held:* Respondents' claim that their First Amendment rights are chilled, due to the mere existence of this data-gathering system, does not constitute a justiciable controversy on the basis of the record in this case, disclosing as it does no showing of objective harm or threat of specific future harm. Pp. ———.

444 F. 2d 947, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion in which MARSHALL, J., joined. BRENNAN, J., filed a dissenting opinion in which STEWART and MARSHALL, JJ., joined.



NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-288

Melvin R. Laird, Secretary of Defense, et al., Petitioners, v. Arlo Tatum et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 26, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Respondents brought this class action in the District Court seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Army's alleged "surveillance of lawful civilian political activity." The petitioners in response describe the activity as "gathering by lawful means, . . . [and] maintaining and using in their intellegience activities, . . . information relating to potential or actual civil disturbances [or] street demonstrations." In connection with respondents' motion for a preliminary injunction and petitioners' motion to dismiss the complaint, both parties filed a number of affidavits with the District Court and presented their oral arguments at a hearing on the two motions. On the basis of the pleadings,[1] the affidavits before the court, and the oral arguments advanced at the hearing, the District Court granted petitioners' mo-

[1] The complaint filed in the District Court candidly asserted that its factual allegations were based on a magazine article: "The information contained in the foregoing paragraphs numbered five through thirteen [of the complaint] was published in the January 1970 issue of the magazine *The Washington Monthly* . . . ."

tion to dismiss, holding that there was no justiciable claim for relief.

On appeal, a divided Court of Appeals reversed and ordered the case remanded for further proceedings. We granted certiorari to consider whether, as the Court of Appeals held, respondents presented a justiciable controversy in complaining of a "chilling" effect on the exercise of their First Amendment rights where such effect is allegedly caused, not by any "specific action of the Army against them, [but] only [by] the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies." 444 F. 2d 947, 953. We reverse.

(1)

There is in the record a considerable amount of background information regarding the activities of which respondents complained; this information is set out primarily in the affidavits that were filed by the parties in connection with the District Court's consideration of respondents' motion for a preliminary injunction and petitioners' motion to dismiss. See Rule 12 (b), Fed. Rules Civ. Proc. A brief review of that information is helpful to an understanding of the issues.

The President is authorized by 10 U. S. C. § 331[2] to make use of the armed forces to quell insurrection

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[2] "Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, and use such of the armed forces, as he considers necessary to suppress the insurrection."

The constitutionality of this statute is not at issue here; the specific authorization of such use of federal armed forces, in addition to state militia, appears to have been enacted pursuant to Art. IV, § 4, of the Constitution, which provides that "[t]he United States . . . shall protect each of [the individual States] . . . on Appli-

and other domestic violence if and when the conditions described in that section obtain within one of the States. Pursuant to those provisions, President Johnson ordered

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cation of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

In describing the requirement of 10 U. S. C. § 331 for the use of federal troops to quell domestic disorders, Attorney General Ramsey Clark made the following statements in a letter sent to all state governors on August 7, 1967:

"There are three basic prerequisites to the use of Federal troops in a state in the event of domestic violence:

"(1) That a situation of serious 'domestic violence' exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is no prescribed wording.

"(2) That such violence cannot be brought under control by the law enforcement resources available to the governor, including local and State police forces and the National Guard. The judgment required here is that there is a definite need for the assistance of Federal troops, taking into account the remaining time needed to move them into action at the scene of violence.

"(3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. The element of request by the governor of a State is essential if the legislature cannot be convened. It may be difficult in the context of urban rioting, such as we have seen this summer, to convene the legislature.

"These elements should be expressed in a written communication to the President, which of course may be a telegram, to support his issuance of a proclamation under 10 U. S. C. § 334 and commitment of troops to action. In case of extreme emergency, receipt of a written request will not be a prerequisite to Presidential action. However, since it takes several hours to alert and move Federal troops, the few minutes needed to write and dispatch a telegram are not likely to cause any delay.

"Upon receiving the request from a governor, the President, under the terms of the statute and the historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federalization of the National Guard.

"Preliminary steps, such as altering the troops, can be taken by the Federal government upon oral communications and prior to

federal troops to assist local authorities at the time of the civil disorders in Detroit, Michigan, in the summer of 1967 and during the disturbances that followed the assassination of Dr. Martin Luther King. Prior to the Detroit disorders, the Army had a general contingency plan for providing such assistance to local authorities, but the 1967 experience led Army authorities to believe that more attention should be given to such preparatory planning. The data-gathering system here involved is said to have been established in connection with the development of more detailed and specific contingency planning designed to permit the Army, when called upon to assist local authorities, to be able to respond effectively with a minimum of force. As the Court of Appeals observed,

> "In performing this type function the Army is essentially a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman.
>
> "No logical argument can be made for compelling the military to use *blind* force. When force is em-

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the governor's determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the federal forces will be needed."

This analysis of Attorney General Clark suggests the importance of the need for information to guide the intelligent use of military forces and to avoid "overkill."

> ployed it should be intelligently directed, and this depends upon having reliable information—in time. As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information . . . .' So we take it as undeniable that the military, *i. e.*, the Army, need a certain amount of information in order to perform their constitutional and statutory missions." 444 F. 2d, at 953 (footnotes omitted).

The system put into operation as a result of the Army's 1967 experience consisted essentially of the collection of information about public activities that were thought to have at least some potential for civil disorder, the reporting of that information to Army Intelligence headquarters at Fort Holabird, Maryland, the dissemination of these reports from headquarters to major Army posts around the country, and the storage of the reported information in a computer data bank located at Fort Holabird. The information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation. Some of the information came from Army Intelligence agents who attended meetings that were open to the public and who wrote field reports describing the meetings, giving such data as the name of the sponsoring organization, the identity of speakers, the approximate number of persons in attendance, and an indication of whether any disorder occurred. And still other information was provided to the Army by civilian law enforcement agencies.

The material filed by the Government in the District Court reveals that Army Intelligence has field offices in various parts of the country; these offices are staffed in the aggregate with approximately 1,000 agents, 94%

of whose time[3] is devoted to the organization's principal mission,[4] which is unrelated to the domestic surveillance system here involved.

By early 1970 Congress became concerned with the scope of the Army's domestic surveillance system; hearings on the matter were held before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Meanwhile, the Army, in the course of a review of the system, ordered a significant reduction in its scope. For example, information referred to in the complaint as the "blacklist" and the records in the computer data bank at Fort Holabird were found unnecessary and were destroyed, along with other related records. One copy of all the material relevant to the instant suit was retained, however, because of the pendency of this litigation. The review leading to the destruction of these records was said at the time the District Court ruled on petitioners' motion to dismiss to be a "continuing" one (App., at 82), and the Army's policies at that time were represented as follows in a letter from the Under Secretary of the Army to Senator Sam J. Ervin, Chairman of the Senate Subcommittee on Constitutional Rights:

> "[R]eports concerning civil disturbances will be limited to matters of immediate concern to the Army—that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and

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[3] Translated in terms of personnel, this percentage figure suggests that the total intelligence operation concerned with potential civil disorders hardly merits description as "massive," as one of the dissents characterizes it.

[4] That principal mission was described in one of the documents filed with the District Court as the conducting of "investigations to determine whether uniformed members of the Army, civilian employees [of the Army] and contractors' employees should be granted access to classified information." (App., at 76–77.)

the National Guard to control. These reports will be collected by liaison with other Government agencies and reported by teletype to the Intelligence Command. They will not be placed in a computer . . . . These reports are destroyed 60 days after publication or 60 days after the end of the disturbance. This limited reporting system will ensure that the Army is prepared to respond to whatever directions the President may issue in civil disturbance situations and without watching lawful activities of civilians." (App., at 80.)

In briefs for petitioners filed with this Court, the Solicitor General has called our attention to certain directives issued by the Army and the Department of Defense subsequent to the District Court's dismissal of the action; these directives indicate that the Army's review of the needs of its domestic intelligence activities has indeed been a continuing one and that those activities have since been significantly reduced.

(2)

The District Court held a combined hearing on respondents' motion for a preliminary injunction and petitioners' motion for dismissal and thereafter announced its holding that respondents had failed to state a claim upon which relief could be granted. It was the view of the District Court that respondents failed to allege any action on the part of the Army that was unlawful in itself and further failed to allege any injury or any realistic threats to their rights growing out of the Army's actions.[5]

[5] In the course of the oral argument, the District Judge sought clarification from respondents' counsel as to the nature of the threats perceived by respondents; he asked what exactly it was in the Army's activities that tended to chill respondents and others in

In reversing, the Court of Appeals noted that respondents "have some difficulty in establishing visible injury." They

> "freely admit that they complain of no specific action of the Army against them. . . . There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent. So far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." 444 F. 2d, at 953.

The court took note of petitioners' argument "that nothing [detrimental to respondents] had been done, that nothing is contemplated to be done, and even if some action by the Army against [respondents] were possibly foreseeable, such would not present a presently justiciable controversy." With respect to this argument, the Court of Appeals had this to say:

> "This position of the appellees [petitioners] does not accord full measure to the rather unique argument advanced by appellants [respondents]. While appellants do indeed argue that in the future it is

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the exercise of their constitutional rights. Counsel responded that it was

"precisely the threat in this case that *in some future civil disorder* of some kind, the Army is going to come in with its list of troublemakers . . . and go rounding up people and putting them in military prisons somewhere." (Emphasis added.)

To this the court responded that "we still sit here with the writ of habeas corpus." At another point, counsel for respondents took a somewhat different approach in arguing that

"*we're not quite sure exactly what they have in mind* and that is precisely what causes the chill, the chilling effect." (Emphasis added.)

possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to the detriment of these civilian appellants, yet appellants do not attempt to establish this as a definitely foreseeable event, or to base their complaint on this ground. Rather, appellants contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on appellants and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights . . . ." 444 F. 2d, at 954. (Emphasis in original.)

Our examination of the record satisfies us that the Court of Appeals properly identified the issue presented, namely, whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose. We conclude, however, that, having properly identified the issue, the Court of Appeals decided that issue incorrectly.[6]

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[6] Indeed, the Court of Appeals noted that it had reached a different conclusion when presented with a virtually identical issue in another of its recently decided cases, *Davis* v. *Ichord*, 422 F. 2d 1207 (CADC 1970). The plaintiffs in *Davis* were attacking the constitutionality of the House of Representatives Rule under which the House Committee on Internal Security conducts investigations and maintains files described by the plaintiffs as a "political blacklist." The court noted that any chilling effect to which the plaintiffs were subject arose from the mere existence of the Committee and

In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *E. g., Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964). In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.

For example, the petitioner in *Baird* v. *State Bar of Arizona* had been denied admission to the bar solely because of her refusal to answer a question regarding the organizations with which she had been associated in the past. In announcing the judgment of the Court,

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its files and the mere possibility of the misuse of those files. In affirming the dismissal of the complaint, the court concluded that allegations of such a chilling effect could not be elevated to a justiciable claim merely by alleging as well that the challenged House Rule was overly broad and vague.

In deciding the case presently under review, the Court of Appeals distinguished *Davis* on the ground that the difference in the source of the chill in the two cases—a House Committee in *Davis* and the Army in the instant case—was controlling. We cannot agree that the jurisdictional question with which we are here concerned is to be resolved on the basis of the identity of the parties named as defendants in the complaint.

Mr. Justice Black said that "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes." 401 U. S., at 7. Some of the teachers who were the complainants in *Keyishian* v. *Board of Regents* had been discharged from employment by the State, and the others were threatened with such discharge, because of their political acts or associations. The Court concluded that the State's "complicated and intricate scheme" of laws and regulations relating to teacher loyalty could not withstand constitutional scrutiny; it was not permissible to inhibit First Amendment expression by forcing a teacher to "guess what conduct or utterances" might be in violation of that complex regulatory scheme and might thereby "lose him his position." 385 U. S., at 604. *Lamont* v. *Postmaster General* dealt with a governmental regulation requiring private individuals to make a special written request to the Post Office for delivery of each individual mailing of certain kinds of political literature addressed to them. In declaring the regulation invalid, the Court said: "The addressee carries an affirmative obligation which we do not think the Government may impose on him." 381 U. S., at 307. *Baggett* v. *Bullitt* dealt with a requirement that an oath of vague and uncertain meaning be taken as a condition of employment by a governmental agency. The Court said: "Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." 377 U. S., at 372.

The decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the

exercise of First Amendment rights. At the same time, however, these decisions have in no way eroded the

> "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action . . . ." *Ex parte Levitt*, 302 U. S. 633, 634 (1937).

The respondents do not meet this test; their claim, simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights. That alleged "chilling" effect may perhaps be seen as arising from respondents', very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents.[7] Allegations of a subjective "chill"

[7] Not only have respondents left somewhat unclear the precise connection between the mere existence of the challenged system and their own alleged chill, but they have also cast considerable doubt on whether they themselves are in fact suffering from any such chill. Judge MacKinnon took cogent note of this difficulty in dissenting from the Court of Appeals' judgment, rendered as it was "on the facts of the case which emerge from the pleadings affidavits and the admissions made to the trial court." 444 F. 2d at 959. At the oral argument before the District Court, counsel for respondents admitted that his clients were "not people, obvi-

are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89 (1947).

Stripped to its essentials, what respondents appear to be seeking is a broad scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission. The following excerpt from the opinion of the Court of Appeals suggests the broad sweep implicit in its holding:

> "Apparently in the judgment of the civilian head of the Army not everything being done in the operation of this intelligence system was necessary to the performance of the military mission. *If the Secretary of the Army can formulate and implement such judgment based on facts within his De-*

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ously, who are cowed and chilled"; indeed, they were quite willing "to open themselves up to public investigation and public scrutiny." But, counsel argued, these respondents must "represent millions of Americans not nearly as forward [and] courageous" as themselves. It was Judge MacKinnon's view that this concession "constitutes a basic denial of practically their whole case." *Ibid.* Even assuming a justiciable controversy, if respondents themselves are not chilled, but seek only to represent those "millions" whom they believe are so chilled, respondents clearly lack that "personal stake in the outcome of the controversy" essential to standing. *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). As the Court recently observed in *Moose Lodge No. 107* v. *Irvis*, — U. S. —, a litigant "has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others."

partmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights." 444 F. 2d 947, 958. (Emphasis added.)

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the "power of the purse"; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.

We, of course, intimate no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army; our conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts.

The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities—and indeed the claims alleged in the complaint—reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable in-

jury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-288

Melvin R. Laird, Secretary of Defense, et al., Petitioners, v. Arlo Tatum et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 26, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I

If Congress had passed a law authorizing the armed services to establish surveillance over the civilian population, a most serious constitutional problem would be presented. There is, however, no law authorizing surveillance over civilians, which in this case the Pentagon concededly had undertaken. The question is whether such authority may be implied. One can search the Constitution in vain for any such authority.

The start of the problem is the constitutional distinction between the "militia" and the Armed Forces. By Art. I, § 7, of the Constitution the militia is specifically confined to precise duties: "to execute the laws of the union, suppress insurrections and repel invasions."

This obviously means that the "militia" cannot be sent overseas to fight wars. They are purely a domestic arm of the governors of the several States,[1] save as they may be called under Art. I, § 8, of the Constitution into the federal service. Whether the "militia" could be given powers comparable to those granted the FBI is a

[1] I have expressed my doubts whether the "militia" loses its constitutional role by an Act of Congress which incorporates it in the armed services. *Drifka* v. *Brainard*, 89 Sup. Ct. Rep. 434.

question not now raised. For we deal here not with the "militia" but with "armies." The Army, Navy, and Air Force are comprehended in the constitutional term "armies." Art. I, § 7, provides that Congress may "raise and support armies," and "provide and maintain a navy," and make "rules for the government and regulation of the land and naval forces." And the Fifth Amendment excepts from the requirement of a presentment or indictment of a grand jury "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Acting under that authority, Congress has provided a code governing the Armed Services. That code sets the procedural standards for the Government and regulation of the land and naval forces. It is difficult to imagine how those powers can be extended to military surveillance over civilian affairs.[2]

The most pointed and relevant decisions of the Court on the limitation of military authority concern the attempt of the military to try civilians. The first leading case was *Ex parte Milligan*, 4 Wall. 2, 124, where the Court noted that the conflict between "civil liberty" and "martial law" is "irreconcilable." The Court which made that announcement would have been horrified at the prospect of the military—absent a regime of martial law—establishing a regime of surveillance over civilians. The power of the military to establish such a system is obviously less than the power of Congress to authorize such surveillance. For the authority of Congress is restricted by its power to "raise" armies, Art. I, § 7; and, to repeat, its authority over the Armed Forces is stated in these terms, "To make rules for the government and regulations of the land and naval forces."

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[2] See Appendix I to this opinion.

The Constitution contains many provisions guaranteeing rights to persons. Those include the right to indictment by a grand jury and the right to trial by a jury of one's peers. It includes the procedural safeguards of the Sixth Amendment in criminal prosecutions; the protection against double jeopardy, cruel and unusual punishments—and of course the First Amendment. The alarm was sounded in the Constitutional Convention about the dangers of the armed services. Luther Martin of Maryland said, ". . . when a government wishes to deprive its citizens of freedom and reduce them to slavery, it generally makes use of a standing army."[3] That danger, we have held, exists not only in bold acts of usurpation of power, but in gradual encroachments. We held that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times both of the offense and of the trial, which eliminates discharged soldiers. *Toth* v. *Quarles*, 350 U. S. 11. Neither civilian employees of the Armed Forces overseas, *McElroy* v. *Guagliardo*, 361 U. S. 281; *Grisham* v. *Hajan*, 361 U. S. 278, nor civilian dependents of military personnel accompanying them overseas, *Kinsella* v. *Singleton*, 361 U. S. 234; *Reid* v. *Covert*, 354 U. S. 1, may be tried by court martial. And even as respects those in the Armed Forces we have held that an offense must be "service connected" to be tried by court-martial rather than by civilian tribunals. *O'Callahan* v. *Parker*, 395 U. S. 258, 272.

The upshot is that the Armed Services—as distinguished from the "militia"—are not regulatory agencies or bureaus that may be created as Congress desires and granted such powers that seem necessary and proper.

[3] 3 Farrand, Records of the Constitutional Convention (1911), p. 209.

The authority to provide rules "governing" the Armed Services means the grant of authority to the Armed Services to govern themselves, not the authority to govern civilians. Even when "martial law" is declared, as it often has been, its appropriateness is subject to judicial review, *Sterling* v. *Constantin*, 287 U. S. 378, 401, 403-404.[4]

Our tradition reflects a desire for civilian supremacy and subordination of military power. The tradition goes back to the Declaration of Independence in which it was recited that the King "has affected to render the military independent of and superior to the civil power." Thus we have the "militia" restricted to domestic use, the restriction of appropriations to the "armies" to two years, Art. I, § 7, and the grant of command over the armies and the militia when called into actual service of the United States to the President, our chief civilian officer. The tradition of civilian control over the Armed Forces was stated by Chief Justice Warren:[5]

> "The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate

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[4] Even some actions of the Armed Services in regulating their own conduct may be properly subjected to judicial scrutiny. Those who are not yet in the Armed Services have the protection of the full panoply of the laws governing admission procedures, see, *e. g.*, *McKart* v. *United States*, 395 U. S. 185; *Oestereich* v. *Selective Service Board*, 393 U. S. 233. Those in the service may use habeas corpus to test the jurisdiction of the Armed Services to try or detain them, see, *e. g.*, *Parisi* v. *Davidson*, 405 U. S. 34; *Noyd* v. *Bond*, 395 U. S. 683, 696 n. 8; *Reid* v. *Covert*, 354 U. S. 1; *Billings* v. *Truesdell*, 321 U. S. 542. And, those in the Armed Service may seek the protection of civilian, rather than military courts, when charged with crimes not service-connected, *O'Callahan* v. *Parker*, 395 U. S. 258.

[5] The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 182, 193 (1962).

balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military services the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society. . . .

"In times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty. This has been true even in the all too imperfect peace that has been our lot for the past fifteen years—and quite rightly so, in my judgment. It is instructive to recall that our Nation at the time of the Constitutional Convention was also faced with formidable problems. The English, the French, the Spanish, and various tribes of hostile Indians were all ready and eager to subvert or occupy the fledgling Republic. Nevertheless, in that environment, our Founding Fathers conceived a Constitution and Bill of Rights replete with provisions indicating that determination to protect human rights. There was no call for a garrison state in those times of precarious peace. We should heed no such call now. If we were to fail in these days to enforce the freedom that until now has been the American citizen's birthright, we would be abandoning for the foreseeable future the constitutional balance of powers and rights in whose name we arm."

Thus, we have until today consistently adhered to the belief that

"[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond* v. *Thomas*, 91 U. S. 712, 716.

It was in that tradition that *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U. S. 579, was decided in which President Truman's seizures of the steel mills in the so-called Korean War was held unconstitutional. As stated by Justice Black:

> "The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." *Id.,* 587.

Madison expressed the fear of military dominance: [6]

> "The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations, and rendered her the mistress of the world.
>
> "Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale

[6] The Federalist No. 41.

it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.

"The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat."

As Chief Justice Warren has observed, the safeguards in the main body of the Constitution did not satisfy the people on their fear and concern of military dominance: [7]

"They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house in time of peace without the consent of the owner. Other Amendments guarantee the right of the people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district and state wherein the crime was committed. The only exceptions made to these civilian trial proce-

[7] Op. cit. n. 5, *supra*, at 185.

> dures are for cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights."

The action in turning the "armies" loose on surveillance of civilians was a gross repudiation of our traditions. The military, though important to us, is subservient and restricted purely to military missions. It even took an Act of Congress to allow a member of the Joint Chiefs of Staff to address the Congress; [8] and that small step did not go unnoticed but was in fact viewed with alarm by those respectful of the civilian tradition. Walter Lippman has written that during World War II, he was asked to convey a message to Winston Churchill, while the latter was in Washington together with his chiefs of staff. It was desired that Churchill should permit his chiefs of staff to testify before Congress as to the proper strategy for waging the war. Lippmann explains, however, that he "never finished the message. For the old lion let out a roar demanding to know why I was so ignorant of the British way of doing things that I could dare to suggest that a British general should address a parliamentary body.

> "As I remember it, what he said was 'I am the Minister of Defense and I, not the generals, will

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[8] The Act of August 10, 1949, provides in § 202 (c) (6):

"No provision of this Act shall be so construed as to prevent a Secretary of a military department or a member of the Joint Chiefs of Staff from presenting to the Congress, on his own initiative, after first so informing the Secretary of Defense, any recommendation relating to the Department of Defense that he may deem proper." See H. R. Rep. No. 1142, 81st Cong., 1st Sess., p. 18. This provision is now codified as 10 U. S. C. § 141 (c).

state the policy of His Majesty's government.'" Lippmann, The Intervention of the General, Washing Post, April 27, 1967.[9]

The act of turning the military loose on civilians even if sanctioned by an Act of Congress, which it has not been, would raise serious and profound constitutional questions. Standing as it does only on brute power and Pentagon policy, it must be repudiated as a usurpation dangerous to the civil liberties on which free men are dependent. For, as Senator Sam Ervin has said, "this claim of an inherent executive branch power of investigation and surveillance on the basis of people's beliefs and attitudes may be more of a threat to our internal security than any enemies beyond our borders." Ervin, Privacy and Government Investigations, 1971 U. Ill. L. F. 137, 153 (1971).

II

The claim that respondents have no standing to challenge the Army's surveillance of them and the other members of the class they seek to represent is too transparent for serious argument. The surveillance of the Army over the civilian sector—a part of society hitherto immune from their control—is a serious charge. It is alleged that the Army maintains files on the membership, ideology, programs, and practices of virtually every activist political group in the country, including groups like the Southern Christian Leadership Conference, Clergy and Laymen United Against the War in Vietnam, The American Civil Liberties Union, Womens Strike for Peace, and the National Association for the Advancement of Colored People. The Army uses undercover agents to infiltrate these civilan groups and to reach into confidential files of students and other groups. The Army moves as a secret group among civilian audiences, using

[9] The full account is contained in Appendix II.

cameras and an electronic ear for surveillance. The data it collects are distributed to civilian officials in state, federal, and local governments and to each military intelligence unit and troop command under the Army's jurisdiction (both here and abroad); and these data are stored in one or more data banks.

Those are the allegations; and the charge is that the purpose and effect of the system of surveillance is to harass and intimidate the respondents and to deter them from exercising their rights of political expression, protest, and dissent "by invading their privacy, damaging their reputations, adversely affecting their employment and their opportunities for employment and in other ways." Their fear is that "permanent reports of their activities will be maintained in the Army's data bank, and their 'profiles' will appear in the so-called 'Blacklist' and that all of this information will be released to numerous federal and state agencies upon request."

Judge Wilkey, speaking for the Court of Appeals, properly held that this Army surveillance "exercises a present inhibiting effect on their full expression and utilization of their First Amendment rights." 444 F. 2d, at —. That is the test. The "deterrent effect" on First Amendment rights by government oversight marks an unconstitutional intrusion, *Lamont* v. *Postmaster General*, 381 U. S. 301, 307. Or as stated by MR. JUSTICE BRENNAN, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Id.*, at 309. When refusal of the Court to pass on the constitutionality of an Act under the normal consideration of forbearance "would itself have an inhibitory effect on freedom of speech" then the Court will act. *United States* v. *Raines*, 362 U. S. 17, 32.

As stated by the Supreme Court of New Jersey, "there is good reason to permit the strong to speak for the weak

or the timid in First Amendment matters." *Anderson* v. *Sills*, 56 N. J. 210, 220 (1970).

One need not wait to sue until he loses his job or until his reputation is defamed. To withhold standing to sue until that time arrives would in practical effect immunize from judicial scrutiny all surveillance activities regardless of their misuse and their deterrent effect. As stated in *Flast* v. *Cohen*, 392 U. S. 83, 101, ". . . in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Or as we put it in *Baker* v. *Carr*, 369 U. S. 186, 204, the gist of the standing issue is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

The present controversy is not a remote, imaginary conflict. Respondents were targets of the Army's surveillance. First, the surveillance was not casual but massive and comprehensive. Second, the intelligence reports were regularly and widely circulated and were exchanged with reports of the FBI, state and municipal police departments, and the CIA. Third, the Army's surveillance was not collecting material in public records but staking-out teams of agents, infiltrating undercover agents, creating command posts inside meetings, posing as press photographers and newsmen, posing as TV newsmen, posing as students, shadowing public figures.

Finally, we know from the hearings conducted by Senator Erwin that the Army has misused or abused its reporting functions. Thus Senator Erwin concludes that

reports of the Army have been "taken from the Intelligence Command's highly inaccurate civil disturbance teletype and filed in Army dossiers on persons who have held, or were being considered for, security clearances, thus contaminating what are supposed to be investigative reports with unverified gossip and rumor. This practice directly jeopardized the employment and employment opportunities of persons seeking sensitive positions with the federal government or defense industry." [10]

Surveillance of civilians is none of the Army's constitutional business and Congress has not undertaken to entrust it with any such function. The fact that since this litigation started the Army's surveillance may have been cut back is not an end of the matter. Whether there has been an actual cutback or whether the announcements are merely a ruse can be determined only after a hearing in the District Court. We are advised by an *amicus* brief filed by a group of former Army Intelligence Agents that Army surveillance of civilians is rooted in secret programs of long standing.

> "Army intelligence has been maintaining an unauthorized watch over civilian political activity for nearly 30 years. Nor is this the first time that Army intelligence has, without notice to its civilian superiors, overstepped its mission. From 1917 to 1924, the Corps of Intelligence Police maintained a massive surveillance of civilan political activity which involved the use of hundreds of civilian informants, the infiltration of civilian organizations and the seizure of dissenters and unionists, sometimes without charges. That activity was opposed—then as now—by civilian officials on those occasions

[10] Hearings, Subcommittee on Constitutional Rights, Sen. Jud. Committee, 92d Cong., 1st Sess., Feb. 23–25, March 2–4, 9–11, 15, 17 (1971).

when they found out about it, but it continued unabated until post-war disarmament and economies finally eliminated the bureaucracy that conducted it."

This case is a cancer in our body politic. It is a measure of the disease which afflicts us. Army surveillance, like Army regimentation, is at war with the principles of the First Amendment. Those who already walk submissively will say there is no cause for alarm. But submissiveness is not our heritage. The First Amendment was designed to allow rebellion to remain as our heritage. The Constitution was designed to keep government off the backs of the people. The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance. The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance. When an Intelligence Officer looks over every nonconformist's shoulder in the library or walks invisibly by his side in a picket line or infiltrates his club, the America once extolled as the voice of liberty heard around the world no longer is cast in the image which Jefferson and Madison designed, but more in the Russian image, depicted in Appendix III to this opinion.

APPENDIX I

The narrowly circumscribed domestic role which Congress has by statute authorized the Army to play is clearly an insufficient basis for the wholesale civilian surveillance of which respondents' complain. The entire domestic mission of the armed services is delimited by nine statutes.

Four define the Army's narrow role as a back-up for civilian authority where the latter has proved insufficient to cope with insurrection:

10 U. S. C. § 331:

"Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection."

10 U. S. C. § 332:

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

10 U. S. C. § 333:

"The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any in-

surrection, domestic violence, unlawful combination, or conspiracy, if it—

"(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

"(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

"In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution."

10 U. S. C. § 334:

"Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time."

Two statutes, passed as a result of Reconstruction Era military abuses, prohibit military interference in civilian elections:

18 U. S. C. § 592:

"Whoever, being an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States.

"This section shall not prevent any officer or member of the armed forces of the United States from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote."

18 U. S. C. § 593:

"Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any State; or

"Whoever, being such officer or member, prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election; or

"Whoever, being such officer or member, orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote; or

"Whoever, being such officer or member, imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law; or

"Whoever, being such officer or member, interferes in any manner with an election officer's discharge of his duties—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both; and disqualified from holding any office of honor, profit or trust under the United States.

"This section shall not prevent any officer or member of the Armed Forces from exercising the right of suffrage in any district to which he may belong, if otherwise qualified according to the laws of the State of such district."

Another Reconstruction Era statute forbids the use of military troops as a posse comitatus:

18 U. S. C. § 1385:

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Finally, there are two specialized statutes. It was thought necessary to pass an Act of Congress to give the armed services some limited power to control prostitution near military bases, and an Act of Congress was required to enable a member of the Joint Chiefs of Staff to testify before Congress:

18 U. S. C. § 1384:

"Within such reasonable distance of any military or naval camp, station, fort, post, yard, base, cantonment, training or mobilization place as the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or any two or all of them shall determine to be needful to the efficiency, health, and welfare of the Army, the Navy, or the Air Force, and shall designate and publish in general orders or bulletins, whoever engages in prostitution or aids or abets prostitution or procures or solicits for purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or bawdy house, or receives any person for puropses of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or permits any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building or leases or rents or contracts to lease or rent any vehicle, conveyance, place, structure or building, or part thereof, knowing or with good reason to know that it is intended

to be used for any of the purposes herein prohibited shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The Secretaries of the Army, Navy, and Air Force and the Federal Security Administrator shall take such steps as they deem necessary to suppress and prevent such violations thereof, and shall accept the cooperation of the authorities of States and their counties, districts, and other political subdivisions in carrying out the purpose of this section.

"This section shall not be construed as conferring on the personnel of the Departments of the Army, Navy, or Air Force or the Federal Security Agency any authority to make criminal investigations, searches, seizures, or arrests of civilians charged with violations of this section."

10 U. S. C. § 141 (e):

"After first informing the Secretary of Defense, a member of the Joint Chiefs of Staff may make such recommendations to Congress relating to the Department of Defense as he may consider appropriate."

APPENDIX II

Walter Lippmann gave the following account of his conversation with Churchill:

"The President's bringing General Westmoreland home in order to explain the war reminds me of an instructive afternoon spent during the Second World War. The country and the Congress were divided on the question of whether to strike first against Hitler or first against Japan. Churchill and Roosevelt had agreed on the policy of Hitler first. But there were large and powerful groups in the country, many of them former isolationists in the sense that they were anti-European, who wanted to concentrate American forces on winning the war against Japan. Even the American chiefs of staff were divided on this question of high strategy.

"Churchill had come to Washington, accompanied by the British chiefs of staff, to work out with President Roosevelt and the Administration, the general plan of the global war. One morning I had a telephone call from Sen. Austin, who was a strong believer in the Churchill-Roosevelt line. He said in effect, 'I know you are seeing the Prime Minister this afternoon and I wish you would ask him to tell his chiefs of staff to come to Congress and testify in favor of our strategical policy.' Quite innocently I said I would do this, and when Churchill received me that afternoon I began by saying that I had a message from Sen. Austin. 'Would the Prime Minister instruct his chiefs of staff to go to the Senate Foreign Relations Committee . . . .' I never finished the message. For the old lion let out a roar demanding to know why I was so ignorant of the British way of doing things that I could dare to suggest that a British general should address a parliamentary body.

"As I remember it, what he said was, 'I am the Min-

ister of Defense and I, not the generals, will state the policy of His Majesty's government.'

"No one who ever aroused the wrath of Churchill is likely to forget it. I certainly have not forgotten it. I learned an indelible lesson about one of the elementary principles of democratic government. And therefore, I take a very sour view of a field commander being brought home by the President to educate the Congress and the American people."

Our military added political departments to their staffs. A Deputy Chief of Naval Operations, Military Policy Division, was first established in the Department of the Navy by Truman in 1945. In the Office of Secretary of Defense that was done by Truman in 1947, the appointee eventually becoming Assistant Secretary for International Security Affairs. A like office was established in 1961 in the Department of the Army by Kennedy and another for the Air Force in 1957 by Eisenhower. Thus when the Pentagon entered a Washington, D. C., conference, its four Secretaries of State faced the real Secretary of State and more frequently than not talked or stared him down. The Pentagon's secretaries of state usually spoke in unison; they were clear and decisive with no ifs, ands, and buts, and in policy conferences usually carried the day.

By 1968, the Pentagon was spending $34 million a year on non-military social and behavioral science research both at home and abroad. One related to "witchcraft, sorcery, magic and other psychological phenomenon" in the Congo. Another concerned the "political influence of university students in Latin America." Other projects related to the skill of Korean women as divers, snake venoms in the Middle East, and the like. Research projects were going on for the Pentagon in 40 countries in sociology, psychology and behavioral sciences.

The department became so powerful that no President would dare crack down on it and try to regulate it.

The military approach to world affairs conditioned our thinking and our planning after World War II.

We did not realize that to millions of these people the difference between Communist dictatorship and the dictatorship under which they presently lived was one. We did not realize that in some regions of Asia it was the Communist party that identified itself with the so-called reform programs, the other parties being mere instruments for keeping a ruling class in power. We did not realize that in the eyes of millions of illiterates the choice between democracy and communism was not the critical choice it would be for us.

We talked about "saving democracy." But the real question in Asia, the Middle East, Africa, and Latin America was whether democracy would ever be born.

We forgot that democracy in most lands is an empty word. We asked illiterate people living at the subsistence level to furnish staging grounds for a military operation whose outcome, in their eyes, had no relation to their own welfare. Those who rejected our overtures must be communists, we said. Those who did not approve our military plans must be secretly aligning with Russia, we thought.

So it was that in underdeveloped areas we became identified not with ideas of freedom, but with bombs, planes, and tanks. We thought less and less in terms of defeating communism with programs of political action, more and more in terms of defeating communism with military might. Our foreign aid mounted; but nearly 70% of it was military aid.

Our fears mounted as the cold war increased in intensity. These fears had many manifestations. The communist threat inside the country was magnified and exalted far beyond its realities. Irresponsible talk

fanned the flames. Accusations were loosely made. Character assassinations were common. Suspicion took the place of goodwill. We needed to debate with impunity and explore to the edges of problems. We needed to search to the horizon for answers to perplexing problems. We needed confidence in each other. But in the 40's, 50's, and 60's suspicions grew. Innocent acts became telltale marks of disloyalty. The coincidence that an idea paralleled Soviet Russia's policy for a moment of time settled an aura of doubt around a person.

APPENDIX III

Alexander I. Solzhenitsyn, the noted Soviet author, made the following statement March 30, 1972, concerning surveillance of him and his family (reported in the Washington Post, April 3, 1972):

. . . A kind of forbidden, contaminated zone has been created around my family, and to this day, there are people in Ryazan [where Solzhenitsyn used to live] who were dismissed from their jobs for having visited my house a few years ago. A corresponding member of the Academy of Sciences, T. Timofeyev, who is director of a Moscow institute, became so scared when he found out that a mathemetician working under him was my wife that he dismissed her with unseemly haste, although this was just after she had given birth and contrary to all laws . . .

It happens that an informant [for his new book on the history of prerevolutionary Russia] may meet with me. We work an hour or two and as soon as he leaves my house, he will be closely followed, as if he were a state criminal, and they will investigate his background, and then go on to find out who this man meets, and then, in turn, who that [next] person is meeting.

Of course they cannot do this with everyone. The state security people have their schedule, and their own profound reasoning. On some days, there is no surveillance at all, or only superficial surveillance. On other days, they hang around, for example when Heinrich Boll came to see me [he is a German writer who recently visited Moscow]. They will put a car in front of each of the two approaches [to the courtyard of the apartment house where he stays in Moscow] with three men in each car—and they don't work only one shift. Then off they go after my visitors, or they trail people who leave on foot.

And if you consider that they listen around the clock to telephone conversations and conversations in my home, they analyze recording tapes and all correspondence, and then collect and compare all these data in some vast premises—and these people are not underlings—you cannot but be amazed that so many idlers in the prime of life and strength, who could be better occupied with productive work for the benefit of the fatherland, are busy with my friends and me, and keep inventing enemies.

SUPREME COURT OF THE UNITED STATES

No. 71-288

Melvin R. Laird, Secretary of Defense, et al., Petitioners, v. Arlo Tatum et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 26, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The Court of Appeals held that a justiciable controversy exists and that respondents have stated a claim upon which relief could be granted. 444 F. 2d 947, 958 (CADC 1971). I agree with Judge Wilkey, writing for the Court of Appeals, that this conclusion is compelled for the following reasons stated by him:

> "[Respondents] contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on [respondents] and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech, etc. The baleful effect, if there is one, is thus a present inhibition of lawful behavior and of First Amendment rights.
>
> "Under this view of [respondents'] allegations, under justiciability standards it is the operation of the system itself which is the breach of the Army's duty toward [respondents] and other civilians. The case is therefore ripe for adjudication. Because the evil alleged in the Army intelligence

system is that of overbreadth, *i. e.,* the collection of information not reasonably relevant to the Army's mission to suppress civil disorder, and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time." *Id.*, at 954–956 (emphasis in original) (footnotes omitted).

"To the extent that the Army's argument against justiciability here includes the claim that [respondents] lack standing to bring this action, we cannot agree. If the Army's system does indeed derogate First Amendment values, the [respondents] are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all of the [respondents] and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records. Since this is precisely the injury of which [respondents] complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine, on the issue of whether the actions complained of do in fact inhibit the exercise of First Amendment rights. Nor should the fact that these particular persons are sufficiently uninhibited to bring this suit be any ground for objecting to their standing." *Id.*, at 954, n. 17.

Respondents may or may not be able to prove the case they allege. But I agree with the Court of Appeals that they are entitled to try. I would therefore affirm the remand to the District Court for a trial and determination of the issues specified by the Court of Appeals.